

*United States Court of Appeals
for the
District of Columbia Circuit*



**TRANSCRIPT OF
RECORD**

JOINT APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,799

**THE NATIONAL BANK OF WASHINGTON
Trustee Under Joint Venture Agreement and
Trust Dated December 27th, 1960**

and

**DONALD S. NASH
Individually and as Trustee Under Joint
Venture Agreement and Trust, etc.**

and

**ROBERT S. NASH
Individually and as Trustee Under Joint
Venture Agreement and Trust, etc.**

Appellants

873

v.

**THE ZONING COMMISSION OF THE DISTRICT OF COLUMBIA,
and its members:
Walter N. Tobriner, et al.**

and

**THE UNITED STATES OF AMERICA
and**

**THE NATIONAL CAPITAL HOUSING AUTHORITY
and its members:
Walter N. Tobriner, et al.**

Appellees

**United States Court of Appeals
for the District of Columbia Circuit**

FILED MAR 29 1965

Nathan J. Paulson
CLERK

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JOINT APPENDIX

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

THE NATIONAL BANK OF WASHINGTON,
14th and G Street, N.W.,
Washington, D.C.,
Trustee under Joint Venture Agreement
and Trust dated December 27th, 1960,

DONALD S. NASH,
1816 Bryant Street, N.E.,
Washington, D.C.,
Individually and Trustee under Joint
Venture Agreement and Trust dated
December 27th, 1960,

ROBERT S. NASH,
4022 Warren Street, N. W.,
Washington, D.C.,
Trustee under Joint Venture Agreement
and Trust dated December 27, 1960.

PLAINTIFFS,

v.

THE ZONING COMMISSION OF THE DISTRICT
OF COLUMBIA,
District Building,
Washington, D.C.

WALTER N. TOBRINER, Commissioner
District Building,
Washington, D.C.

CHARLES M. DUKE, Commissioner
District Building,
Washington, D.C.

JOHN B. DUNCAN, Commissioner
District Building,
Washington, D.C.

GEORGE B. HARTZOG,
Director of the National Park Service,
C St., between 18th and 19th Sts., N.W.,
Washington, D.C.

C.A. No. 394-64

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PLAINTIFFS,

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GEORGE B. HARTZOG,
Director of the National Park Service,
C St., between 18th and 19th Sts., N.W.,
Washington, D.C.

C.A. No. 394-64

J. GEORGE STEWART,
Architect of the Capitol,
Room SB 15
United States Capitol Building,
Washington, D.C.

As members of the Zoning Commission
of the District of Columbia,

and

NATIONAL CAPITAL HOUSING AUTHORITY,
1729 New York Avenue, N.W.,
Washington, D.C.

WALTER N. TOBRINER,
As Chairman,
National Capital Housing Authority,
District Building,
Washington, D.C.

WALTER E. WASHINGTON, Executive
Director
National Capital Housing Authorities,
1729 New York Ave., N.W.,
Washington, D.C.

DEFENDANTS

[Filed, February 14, 1964]

COMPLAINT FOR INJUNCTIVE RELIEF

1. The jurisdiction of this Court is based upon Section 11-306, District of Columbia Code (1961 Ed.). Plaintiffs, Robert S. Nash and Donald S. Nash are citizens of the United States and residents of the District of Columbia. Plaintiff, The National Bank of Washington, is a corporation organized under the banking laws of the United States, and doing business in the District of Columbia. Individual defendants are citizens of the United States and residents of the District of Columbia and are sued in their official capacities as members of the Zoning Commission and the National Capital Housing Authority, respectively.

2. Plaintiffs, Robert S. Nash, Donald S. Nash, and The National Bank of Washington are trustees under a joint venture agreement and trust dated December 27, 1960, of which trust the following squares are a part: Squares 4119, 4112, and W4112 (except lot 800); Donald S. Nash is the owner of Square E4112 and Square 4110 (except lots 801, 802, 805, 806) in the District of Columbia, together with improvements thereon.

3. The property in controversy consists of all of said Squares 4110, E4112, 4112 and W4112 and 4119, owned as aforesaid, and located in the District of Columbia, as well as all of Square 4109. A plat showing the property in controversy is attached hereto and marked Exhibit "T".

4. The property in controversy is located in an R-1 district; the property to the south and east of said property and immediately adjacent thereto is zoned C-M-1. The property to the north of said property is zoned R-1.

5. By Act of March 1, 1920, and subsequent amendments, there was created a Zoning Commission with the power to "divide the District of Columbia into districts of zones in such number, shape and area as the said Zoning Commission may determine, and within such districts may regulate the erection, construction, reconstruction, alteration, conversion, maintenance and uses of buildings and structures and the uses of land." The Act also provides the Zoning Commission with the power to amend the regulations or the zoning map, and expressly sets forth procedures for amendment of said regulations or map.

6. Pursuant to the power granted to it under the Act of March 1, 1920, (commonly known as the "Zoning Act") the Zoning Commission, on March 12, 1948, promulgated the "Zoning Regulations of the District of Columbia" which provide in pertinent part as follows:

Section 9101 - Procedure for Amendments.

9101.1 As provided in the Zoning Act of June 20, 1938 (52 Stat. 797), as amended, the Zoning Commission may from time to time amend any, part, or all of these regulations and zoning maps adopted herein.

9101.2 Amendments to these regulations or zoning maps may be proposed by:

9101.21 The owner of property for which amendments are proposed; or,

9101.22 The Zoning Commission, National Capital Planning Commission, Redevelopment Land Agency, National Capital Housing Authority, or any other department of the Government of the District of Columbia or of the Federal Government.

9101.3 Proposed amendments hereto shall be submitted in duplicate to the office of the Zoning Commission.

9101.4 Before adopting any proposed amendment to these regulations and zoning maps the Zoning Commission shall:

9101.41 Submit such proposed amendment to the Zoning Advisory Council for opinion or report, provided, that if the Zoning Advisory Council shall fail to transmit its opinion or report to the Zoning Commission within the period specified in Section 7509 the Zoning Commission may proceed to take final action on such amendment; and,

9101.42 Held a public hearing on such proposed amendment, provided:

(a) Notice of the time and place of such public hearing shall be published at least once in a daily newspaper or newspapers of general circulation in the District of Columbia at least 30 days in advance of such hearing;

(b) Such notice shall include a general summary of the proposed amendment to these regulations and the boundaries of any territory included in the proposed amendment to the zoning map;

(c) The Zoning Commission shall give such additional notice of the hearing as it shall deem feasible and practicable; and,

(d) Such public hearing may be adjourned from time to time and if the time and place of the adjourned hearing be publicly announced when the adjournment is had no further notice of such adjourned hearing need be published.

9101.5 Any amendment to these regulations or zoning maps shall require the favorable vote of not less than a majority of the full membership of the Zoning Commission.

7. On December 6, 1962, upon the application of the National Capital Housing Authority, the D.C. Commissioners (defendants herein, as members of the Zoning Commission) approved Square 4119 as a site for low rent public housing; on September 13, 1963, the subject site was similarly approved by the National Capital Planning Commission.

8. On December 3, 1963, the National Capital Housing Authority, by its Executive Director, Walter E. Washington made application to defendant, the Zoning Commission, for a change of zoning of Square 4119 from R-1-B to R-3; plaintiffs, owners of said property, received no notice of said application from either the defendant, National Capital Housing Authority, or from the defendant, Zoning Commission. The application contained a request that if the property is rezoned in accordance with the Authority's petition, that the effective date of the rezoning action be made subsequent to the Authority's acquisition of title to the property. (See Exhibit 3).

9. Under date of December 30, 1963, plaintiffs, owners of said property, applied for a rezoning of Square 4119, W4112, 4112, E4112,

4110 and 4109 from R-1-B to C-M-1; said application was supported by an affidavit of Charles C. Koones, affidavit of Robert S. Nash and Donald S. Nash, a plat of the area sought to be rezoned, and copies of certain pertinent correspondence, all of which are attached hereto and marked as Exhibit "2".

10. On or about January 23, 1964, plaintiffs were notified by the Zoning Commission that it would hold a public hearing on February 28, 1964, on "the proposal to change from R-1-B to R-5-A all lots in Squares 4109, 4110, E4112, 4112, W4112 and 4119, or in the alternative change from R-1-B to R-3 all of the above mentioned lots . . ."; since the proposed changes mentioned in said letter from the Zoning Commission bore no relation to the changes requested in plaintiffs' applications, plaintiffs' counsel on January 30, 1964, inquired personally at the Zoning Commission Office in the District Building; counsel was informed for the first time that the National Capital Housing Authority had applied for a change in zoning of plaintiffs' property, and further learned for the first time that plaintiffs' applications for rezoning of the subject property had been denied by the Zoning Commission in Executive Session on January 15, 1964; he was also advised that the Notice of Hearing referred to in paragraph 10, above, was issued upon application of the National Capital Housing Authority and not upon plaintiffs' application; that the February 28th hearing as to Squares 4112, W4112, E4112, 4110 and 4109 was at the instance of the Zoning Commission.

11. Upon the occasion of the plaintiffs' visit to the Office of the Zoning Commission aforesaid, plaintiffs were allowed to examine a file containing the application of the National Capital Housing Authority for change in zoning of plaintiffs' properties; among other material in the said file was a letter dated December 3, 1963, addressed to the "Zoning Commissioners, Office of the Zoning Commission" and signed by Walter E. Washington, Executive Director. Counsel requested, and was handed a copy of said letter, a copy of which is attached hereto and marked as Exhibit "3"; in pertinent part the letter reads:

"The District's need for housing for low-income families is urgent, as you know, and is likely to become even more so in the near future as more families are displaced. Locating suitable sites for the construction of public housing is a mounting problem for the Authority — a problem which we believe the District Government may possibly be in a position to help solve. The re-zoning of the subject Square 4119 would be most helpful in making it economically feasible for the Authority to proceed with the construction of this housing project.

"Although Paragraph 9101.22 of the Zoning Regulations specifically gives the Authority the right to propose a zoning amendment without requiring it to be the owner, we request that if the property is rezoned, the effective date of the rezoning action be made subsequent to the Authority's acquisition of title to the property." (Underscoring ours).

12. Plaintiffs assert that they, as applicants before the Zoning Commission, complied with all prerequisites of the Zoning Regulations for hearing on their proposed amendments. The Zoning Commission denied plaintiffs' applications in "Executive Session", without public hearing and without any notice whatsoever to plaintiffs, all of which is contrary to the provisions of the District of Columbia Code (1961 Edition) and the Zoning Regulations.

13. Plaintiffs assert, upon information and belief, that the Zoning Commission's denial of plaintiffs' applications is not based upon the record before it, including the applications of plaintiffs plats, affidavits and pertinent correspondence as aforesaid, but that it is the result of improper pressure exerted upon the members of said Commission by person or persons in the Executive Branch of the United States Government, (see Exhibit "3"). Plaintiffs assert that the order does not represent the independent judgment of the Commission based

upon the record and the applicable regulations and is therefore illegal and invalid.

14. As a consequence, plaintiffs assert that they will be irreparably injured by the action of the defendants and assert that there is no adequate or available remedy at law; that said action of the Commission will cause injury to plaintiffs' property rights both as to value and use and denies them due process of the laws in violation of the Constitution of the United States.

15. Plaintiffs assert that the action of the Zoning Commission is arbitrary, unreasonable and constitutes clear abuse of discretion.

WHEREFORE, the plaintiffs pray:

- (1) That all the records of the Zoning Commission in connection with any applications for rezoning of the subject properties, be certified to this Court.
- (2) That the denial by the said Zoning Commission of plaintiffs' applications for rezoning of subject properties be declared illegal, void and of no force and effect.
- (3) That a mandatory injunction be granted herein, directing said Zoning Commission to set aside its denial of plaintiffs' applications for rezoning of the subject properties and further directing the said Zoning Commission to amend the Zoning Map to change Squares W4112, 4112, E4112, 4110, 4109 and 4119 from R-1-B to C-M-1.
- (4) That an injunction be entered herein prohibiting the National Capital Housing Authority or its agents or assigns from taking any action toward the acquisition of title to the subject properties.
- (5) That an injunction be entered herein prohibiting the Zoning Commission, its agents or assigns, from hearing any applications by itself or the National

Capital Housing Authority for amendment of the
Zoning Map in connection with the subject properties.

HANNAN, CASTIELLO & BERLOW,

BY:

William T. Hannan
Counsel for Plaintiffs

[Filed, February 19, 1964]

MOTION FOR PRELIMINARY INJUNCTION

Come now plaintiffs, by and through their attorney, William T. Hannan, Esq., and move this Court for a preliminary injunction in the above cause, restraining and enjoining the defendants as follows, in order that the status quo may be preserved pending final hearing of the substantial questions raised in the Complaint:

1. Enjoining defendant, Zoning Commission, its agents, servants or employees, temporarily and permanently, from considering or approving any application for amendments to the Zoning Map other than those amendments sought by plaintiffs.
2. Enjoining defendant, National Capital Housing Authority, its agents, servants or employees, temporarily and permanently, from taking any action whatsoever toward the acquisition of title to subject property pending final hearing on the issues raised in the Complaint.
3. To restrain and enjoin the National Capital Housing Authority from unlawfully exerting or attempting to exert influence upon the Zoning Commission directly or indirectly.

As ground for the foregoing Motion plaintiffs respectfully refer this Honorable Court to the Points and Authorities attached hereto which are prayed to be read as a part hereof.

HANNAN, CASTIELLO & BERLOW

BY:

William T. Hannan
Counsel for Plaintiffs

[Filed, February 26, 1964]

**OPPOSITION OF NATIONAL CAPITAL
HOUSING AUTHORITY, ITS CHAIRMAN AND
ITS EXECUTIVE DIRECTOR TO MOTION
FOR PRELIMINARY INJUNCTION**

Come now the National Capital Housing Authority, Walter N. To-briner, Chairman and Walter E. Washington, Executive Director, by and through their attorney, the United States Attorney for the District of Columbia and oppose plaintiffs' motion for preliminary injunction for the following reasons:

1. The Court lacks jurisdiction to enjoin the acquisition of land by the National Capital Housing Authority, an agency of the United States.
2. Plaintiffs have adequate remedies at law.
3. Plaintiffs show neither irreparable injury or the likelihood of success on the merits.

David C. Acheson
United States Attorney

Charles T. Duncan,
Principal Assistant United
States Attorney

Joseph M. Hannon
Assistant United States
Attorney

Sylvia A. Bacon
Assistant United States
Attorney

Temp. Restraining Order denied. Hearing on
motion for preliminary injunction set for
3/6/64, 10:00 a.m. R. B. Keech, 2/27/64.

[Filed, February 28, 1964]

NOTICE TO TAKE DEPOSITION

Please take notice that at 10:00 a.m. on Wednesday, March 4, 1964, the Plaintiffs will take the Deposition of Walter E. Washington, Executive Director, National Capital Housing Authority, Joseph W. Hoban, Jr., Deputy Director Project Development, National Capital Housing Authority, and Walter E. Simpson, Jr., General Counsel, National Capital Housing Authority, at the office of Hannan, Castiello & Berlow, 637 Woodward Building, Washington 5, D.C., on oral examination pursuant to the Federal Rules of Civil Procedure, before an officer duly authorized by law to administer oaths.

William T. Hannan
Attorney for Plaintiffs

[Filed, March 3, 1964]

Motion to Quash Notice to Take Deposition
of Walter E. Washington, Joseph W. Hoban, Jr.
and Walter E. Simpson, Jr.

and

Motion to Quash Subpoenas Duces Tecum Served
March 2, 1964 on Walter E. Washington, Joseph
W. Hoban, Jr. and William R. Simpson, Jr.

Come now Walter E. Washington, Joseph W. Hoban, Jr. and William R. Simpson, Jr. by and through their attorney the United States Attorney for the District of Columbia and move to quash the notice to take their depositions and the subpoenas duces tecum served on them on March 2, 1964 for the following reasons:

1. The notice to take deposition is premature and unauthorized.
2. Jurisdictional questions should be determined prior to the taking of depositions.
3. Two days notice is unreasonable.
4. The subpoenas are unreasonably broad and burdensome.

David C. Acheson
United States Attorney

Charles T. Duncan
Principal Assistant United
States Attorney

Joseph M. Hannon
Assistant United States Attorney

Sylvia A. Bacon
Assistant United States Attorney

[Filed, March 9, 1964]

NOTICE TO TAKE DEPOSITION

Please take notice that at 10:00 a.m. on Friday, March 13, 1964, the Plaintiffs will take the deposition of Walter E. Washington, Executive Director, National Capital Housing Authority, Joseph W. Hoban, Jr., Deputy Director Project Development, National Housing Authority, and Walter E. Simpson, Jr., General Counsel, National Capital Housing Authority, at the offices of Hannan, Castiello & Berlow, 637 Woodward Building, Washington, D. C., 20005, on oral examination pursuant to the Federal Rules of Civil Procedure, before an officer duly authorized by law to administer oaths.

William T. Hannan
Attorney for Plaintiffs

[Filed, March 10, 1964]

ORDER CONTINUING HEARING ON
MOTION FOR PRELIMINARY IN-
JUNCTION AND FOR LEAVE TO
AMEND.

Upon Plaintiffs' Motion to continue the date for hearing on Plaintiffs' Motion for Preliminary Injunction, and to withdraw Notice of Taking of Depositions of Walter E. Washington, William R. Simpson, Jr., and Joseph W. Hoban, Jr., and subpoenas issued thereon, counsel for Defendants having been present, it is by the Court this 10th day of March, 1964,

ORDERED, that the Motion for Preliminary Injunction be and the same is hereby continued for an indefinite period, to be set again for hearing upon agreement of counsel, and failing the agreement of counsel upon a date, the same to be set down by the Motions Clerk, and it is further

ORDERED, that Plaintiffs' Notice of Taking of Deposition is considered withdrawn and the subpoenas quashed; and it is further

ORDERED, that the Plaintiffs be granted leave to amend their Complaint by March 16, 1964.

R. B. Keech
Judge

[Filed, March 12, 1964]

**MOTION TO QUASH NOTICE TO TAKE
DEPOSITION AND SUBPOENAS DUCES
TECUM DATED MARCH 9, 1964 DIRECTED
TO WALTER E. WASHINGTON, JOSEPH W.
HOBAN, JR. AND WILLIAM R. SIMPSON, JR.**

Come now Walter E. Washington, Joseph W. Hoban, Jr. and Walter E. Simpson, Jr. by and through their attorney, the United States Attorney for the District of Columbia, and move to quash the notice to take their depositions filed March 9, 1964 and the subpoenas duces tecum returnable March 13, 1964 for these and such other reasons as may be advanced upon oral hearing:

1. The notice and subpoenas are identical to those which were withdrawn pending amendment of the complaint.
2. Reissuance of the notice and subpoenas at this time is harassing, burdensome and oppressive.
 - a. Discovery procedures should not be allowed until after amendment of the complaint and determination of the jurisdictional questions of law raised in the motions to dismiss.

- b. The subpoenas continue to be unreasonably broad and fail to designate documents containing evidence.
- c. The notice is again unreasonably short.
- 3. Subpoena duces tecum is not the proper procedure for obtaining documents from a party.

Deponents also seek protective orders under Rule 30(b), Federal Rules of Civil Procedure suspending discovery until determination of the pending motions to dismiss or postponing the taking of depositions until amendment of the complaint and limiting the scope of that discovery to such facts as may be relevant to the new jurisdictional issues.

**David C. Acheson
United States Attorney**

**Charles T. Duncan
Principal Assistant United
States Attorney**

**Joseph M. Hannon
Assistant United States Attorney**

**Sylvia A. Bacon
Assistant United States Attorney**

[Filed, March 19, 1964]

**MEMORANDUM OF POINTS AND AUTHORITIES
OPPOSITION TO MOTION TO QUASH
NOTICE TO TAKE DEPOSITION AND SUBPOENAS
DUCES TECUM FILED BY DEFENDANT,
NATIONAL CAPITAL HOUSING AUTHORITY**

Come now plaintiffs in the above cause and oppose the Motion to Quash Notice to Take Deposition and Subpoenas Duces Tecum filed herein by defendant, National Capital Housing Authority, for these and for such other reasons as may be advanced upon oral hearing:

* * *

[Caption identical to original complaint
except for the addition of the United States
of America as party defendant.]

[Filed, March 30, 1964]

AMENDED COMPLAINT FOR INJUNCTIVE RELIEF

1. The jurisdiction of this Court is based upon Section 11-306, District of Columbia Code (1961 Ed.). Plaintiffs, Robert S. Nash and Donald S. Nash are citizens of the United States and residents of the District of Columbia. Plaintiff, The National Bank of Washington, is a corporation organized under the banking laws of the United States, and doing business in the District of Columbia. Individual defendants are citizens of the United States and residents of the District of Columbia and are sued in their official capacities as members of the Zoning Commission and the National Capital Housing Authority, respectively.

2. Plaintiffs, Robert S. Nash, Donald S. Nash, and The National Bank of Washington are trustees under a joint venture agreement and trust dated December 27, 1960, of which trust the following squares are a part: Squares 4119, 4112, and W4112 (except lot 800); Donald S. Nash is the owner of Square E4112 and Square 4110 (except lots 801, 802, 805, 806) in the District of Columbia, together with improvements thereon.

3. The property in controversy consists of all of said Squares 4110, E4112, 4112 and W4112 and 4119, owned as aforesaid, and located in the District of Columbia, as well as all of Square 4109. A plat showing the property in controversy is attached hereto and marked Exhibit "I".

4. The property in controversy is located in an R-1 district; the property to the south and east of said property and immediately adjacent thereto is zoned C-M-1. The property to the north of said property is zoned R-1.

5. By Act of March 1, 1920, and subsequent amendments, there was created a Zoning Commission with the power to "divide the District of Columbia into districts of zones in such number, shape and area as the said Zoning Commission may determine, and within such districts may regulate the erection, construction, reconstruction, alteration, conversion, maintenance and uses of buildings and structures and the uses of land." The Act also provides the Zoning Commission with the power to amend the regulations or the zoning map, and expressly sets forth procedures for amendment of said regulations or map.

6. On December 6, 1962, upon the application of the National Capital Housing Authority, the D.C. Commissioners (defendants herein, as members of the Zoning Commission) approved Square 4119 as a site for low rent public housing; on September 13, 1963, the subject site was similarly approved by the National Capital Planning Commission.

7. On December 3, 1963, the United States of America, and/or the National Capital Housing Authority, by its Executive Director, Walter E. Washington made application to defendant, the Zoning Commission, for a change of zoning of Square 4119 from R-1-B to R-3; plaintiffs, owners of said property, received no notice of said application from either the defendant, National Capital Housing Authority, or from the defendant, Zoning Commission. The application contained a request that if the property is rezoned in accordance with the Authority's petition, that the effective date of the rezoning action be made subsequent to the Authority's acquisition of title to the property. (See Exhibit 3).

8. On, to wit, December 30, 1963, plaintiffs, owners of said property, applied for a rezoning of Square 4119, W4112, 4112, E4112, 4110 and 4109 from R-1-B to C-M-1; said application was supported by an affidavit of Charles C. Koones, affidavit of Robert S. Nash and Donald S. Nash, a plat of the area sought to be rezoned, and copies of certain pertinent correspondence, all of which are attached hereto and marked as Exhibit "2".

9. On or about January 23, 1964, plaintiffs were notified by the Zoning Commission that it would hold a public hearing on February 28, 1964, on "the proposal to change from R-1-B to R-5-A all lots in Squares 4109, 4110, E4112, 4112, W4112 and 4119, or in the alternative change from R-1-B to R-3 all of the above mentioned lots . . ."; since the proposed changes mentioned in said letter from the Zoning Commission bore no relation to the changes requested in plaintiffs' applications, plaintiffs' counsel on January 30, 1964, inquired personally at the Zoning Commission Office in the District Building; counsel was informed for the first time that the National Capital Housing Authority had applied for a change in zoning of plaintiffs' property, and further learned for the first time that plaintiffs' applications for rezoning of the subject property had been denied by the Zoning Commission in Executive Session on January 15, 1964; he was also advised that the Notice of Hearing referred to in paragraph 10, above, was issued upon application of the National Capital Housing Authority and not upon plaintiffs' application; that the February 28th hearing as to Squares 4112, W4112, E4112, 4110 and 4109 was at the instance of the Zoning Commission.

10. Upon the occasion of the plaintiffs' visit to the Office of the Zoning Commission aforesaid, plaintiffs were allowed to examine a file containing the application of the National Capital Housing Authority for change in zoning of plaintiffs' properties; among other material in the said file was a letter dated December 3, 1963, addressed to the "Zoning Commissioners, Office of the Zoning Commission" and signed Walter E. Washington, Executive Director. Counsel requested, and was handed a copy of said letter, a copy of which is attached hereto and marked as Exhibit "3"; in pertinent part the letter reads:

"The District's need for housing for low-income families is urgent, as you know, and is likely to become even more so in the near future as more families are displaced. Locating suitable sites

for the construction of public housing is a mounting problem for the Authority — a problem which we believe the District Government may possibly be in a position to help solve. The re-zoning of the subject Square 4119 would be most helpful in making it economically feasible for the Authority to proceed with the construction of this housing project.

"Although Paragraph 9101.22 of the Zoning Regulations specifically gives the Authority the right to propose a zoning amendment without requiring it to be the owner, we request that if the property is rezoned, the effective date of the rezoning action be made subsequent to the Authority's acquisition of title to the property." (Underscoring ours.)

11. Plaintiffs assert that they, as applicants before the Zoning Commission, complied with all prerequisites of the Zoning Regulations for hearing on their proposed amendments. The Zoning Commission denied plaintiffs' applications in "Executive Session", without public hearing and without timely notice whatsoever to plaintiffs, all of which is contrary to the provisions of The Constitution of the United States as depriving plaintiffs of property without due process of law.

12. Plaintiffs assert, upon information and belief, that the Zoning Commission's denial of plaintiffs' applications is not based upon the record before it, including the applications of plaintiffs, plats, affidavits and pertinent correspondence as aforesaid, but that it is the result of improper pressure exerted upon the members of said Commission by person or persons in the Executive Branch of the United States Government, to wit, The National Capital Housing Authority, (see Exhibit "3"). Plaintiffs assert that the order does not represent the independent judgment of the Commission based upon the record and the applicable regulations and is therefore illegal and invalid.

13. As a consequence, plaintiffs assert that they will be irreparably injured by the action of the defendants and assert that there is no

adequate or available remedy at law; that said action of the Commission will cause injury to plaintiffs' property rights both as to value and use and denies them due process of the laws and equal protection under the laws in violation of the Constitution of the United States.

14. Plaintiffs assert that the action of the Zoning Commission is arbitrary, unreasonable and constitutes clear abuse of discretion.

15. Defendants the Zoning Commission, in their respective capacities as outlined hereinbefore have acted arbitrarily and capriciously in their denial of the zoning sought by plaintiffs and have violated the rights granted to plaintiffs under the Constitution of the United States in that they have (a) denied the plaintiffs a public hearing on plaintiffs' application for rezoning of their property to a zoning for a reasonable use, thereby depriving plaintiffs of such reasonable use of their property, and; (b) in granting to the defendant, National Capital Housing Authority, a stranger to title, a hearing and an underzoning of plaintiffs' property for the benefit of the said National Capital Housing Authority, and not for the benefit of the plaintiffs and thus depriving plaintiffs of due process of laws and equal protection under the laws; (c) in granting to defendant, National Capital Housing Authority, the underzoning requested on Square 4119, defendant, Zoning Commission, denied plaintiffs due process of laws and equal protection under the laws as aforesaid; and (d) defendant, Zoning Commission, in denying plaintiffs' application for rezoning of such properties to C-M-1 and in rezoning Squares W4112, 4112, E4112, 4110 to R-5-A, have denied to the plaintiffs the reasonable use of their property and due process and equal protection under the laws.

16. Defendants, The United States of America, and the National Capital Housing Authority and named officials thereof have secretly and otherwise improperly influenced and impressed the defendant, Zoning Commission so as to defeat plaintiffs in their attempt to exercise their right to rezoning and have thus deprived plaintiffs of equal protection under the laws and due process of the laws as guaranteed by the Constitution of the United States.

WHEREFORE, the plaintiffs pray:

1. That all the records of the Zoning Commission in connection with any applications for rezoning of the subject properties, be certified to this Court.
2. That the denial by the said Zoning Commission of plaintiffs' applications for rezoning of subject properties be declared illegal, void and of no force and effect.
3. That a mandatory injunction be granted herein, directing said Zoning Commission to set aside its granting of application of National Capital Housing Authority for rezoning of Square 4119, denial of plaintiffs' applications for rezoning of all the subject properties and further directing the Zoning Commission to amend the Zoning Map to change Squares W4112, 4112, E4112, 4110, 4109 and 4119 to C-M-1.
4. That an injunction be entered herein prohibiting the National Capital Housing Authority or its agents or assigns from taking any action toward the acquisition of title to the subject properties, until this Court shall have heard and disposed of these matters finally.
5. And for such other and further relief as to the Court may seem just and proper.

HANNAN, CASTIELLO & BERLOW

BY:

William T. Hannan
Counsel for Plaintiffs

Excerpts From Transcript of Proceedings

Washington, D. C., March 23, 1964

BEFORE THE HONORABLE RICHMOND B. KEECH, United States District Judge, Preliminary Matter.

APPEARANCES:

WILLIAM T. HANNAN, esq., and KENT THORUP, Esq., for the Plaintiffs.

SYLVIA BACON, Esq., for National Capital Housing Authority, Defendant.

ROBERT REDMAN, Esq., Corporation Counsel, for Zoning Commission, Defendant.

* * *

MR. HANNAN: If Your Honor please, if -- unless and until we can get these depositions, we will not know the facts upon which to make our arguments fully on the motion to dismiss.

We will just be --

THE COURT: Excuse me. I am trying to be helpful, sir. As I view this, there are at least certain matters which are questions of law as to which you will need no depositions.

MR. HANNAN: One, yes.

THE COURT: It may be and, as a matter of fact, we may in the course of this motion to dismiss have developed other questions and I am confident that whoever may be the judge sitting at that aspect of the case, whoever it may be, that if they reach a point where it can't be resolved on the naked question of the law, that consideration would be given then and I think he would give the time for the taking of the depositions.

MR. HANNAN: May I ask this? It is not impertinent and why can't we take their depositions?

THE COURT: Because it may be that they would not be appropriate depositions for certain purposes, sir, and as I understand the

law to be, Mr. Hannan, with due respect to you, that a person should not be charged with the onerous duty, and sometimes it is onerous, of being subjected to the taking of depositions where on the pleadings, as they do in fact stand, they would be entitled to be extracted from the picture and it is for that reason, at this time, that I said the motion to dismiss as to the naked question of the law, as distinguished from the mixed question of law, I thought appropriate.

MR. HANNAN: Well, what stumps me, if Your Honor please, is that the very thing they say, the very reasons that they say this court has no jurisdiction, are the very things that we wish to establish in that deposition.

In other words, we really would be brought in here with both hands tied behind us. They stand up and say you sued the wrong people and you can't sue us and those are the two things that --

THE COURT: All right sir. I will say to you that is a naked proposition of law and I will so hold to relieve you of that and that will give you a point to preserve.

* * *

[Filed, April 6, 1964]

Motion of Defendants Walter N. Tobriner, Charles M. Duke, John B. Duncan, George B. Hartzog and J. George Stewart, Members of the Zoning Commission of the District of Columbia, to Dismiss or, in the Alternative, for Summary Judgment on the Amended Complaint

Defendants Walter N. Tobriner, Charles M. Duke, John B. Duncan, George B. Hartzog and J. George Stewart move the Court to dismiss the amended complaint on the grounds that it fails to state a claim against them upon which relief can be granted.

Alternatively, these defendants move the Court for summary judg-

ment in their favor on the ground that upon consideration of the amended complaint and attached exhibits, this motion, the undisputed facts set out in their statement of material facts not in dispute, the affidavit of Robert O. Clouser, with Exhibits marked D.C.1 through D.C.7, attached hereto, which are by reference incorporated herein, demonstrate that there is no genuine issue as to any material facts and that these defendants are entitled to judgment on the amended complaint as a matter of law. (Note: The Exhibits marked D.C.1 through D.C. 7 are not attached but will be submitted to the Court at the time of oral argument on this motion.)

Chester H. Gray
Corporation Counsel, D. C.

John A. Earnest
Assistant Corporation
Counsel, D.C.

George H. Clark
Assistant Corporation
Counsel, D. C.

Robert R. Redmon
Assistant Corporation
Counsel, D. C.

[Filed, April 6, 1964]

Statement of Material Facts of Defendant
Members of the Zoning Commission of the
District of Columbia as to Which There is
No Genuine Issue

1. Application of Donald S. Nash dated February 25, 1959, requesting that the Zoning Commission consider changing the zoning on Square 4119 in the District of Columbia from R-1-B to C-M-1.
2. After proper notice, a public hearing was held on said request by the Zoning Commission on June 3, 1959.

3. The Zoning Advisory Council, in its report on said application for a change of zoning dated June 3, 1959 recommended that the change in zoning requested by the applicant would be adverse to the development with single family dwellings of unimproved land to the north, west and south of the subject square and would constitute an unwarranted projection of unrestricted zoning into two one-family districts. Further, the report of the Council recommended that the zoning of the subject square be changed from R-1-B to R-3.

4. The Zoning Commission, on June 16, 1959, denied the application for a change in zoning from R-1-B to C-M-1 on Square 4119 and rejected the recommendation of the Zoning Advisory Council that said zoning be changed from R-1-B to R-3.

5. On December 3, 1963, the National Capital Housing Authority, through its Executive Director, Walter E. Washington, filed an application under Article 91 of the Zoning Regulations of the District of Columbia requesting that the R-1-B zoning on Square 4119 in the District of Columbia be changed to a R-3 District.

6. Attached to the request of the National Capital Housing Authority was a site development plan and a copy of a plat showing the streets and squares in the vicinity of Square 4119. Said application was file No. 63-84.

7. On January 23, 1964, the Zoning Commission notified the National Capital Housing Authority that it would hold a public hearing to consider a proposal to change the zoning from R-1-B to R-5-A or from R-1-B to R-3 on all lots in Squares 4109, 4110, E-4112, 4112, W-4112 and 4119.

8. On March 11, 1964, the Zoning Commission, in a letter to Walter E. Washington, Executive Director, National Capital Housing Authority, notified the National Capital Housing Authority that it, on March 3, 1964, after the public hearing of February 28, 1964, approved a change in zoning from R-1-B to R-3 of all of the lots in Squares 4119, 4109, 4110, E-4112, 4112 and W-4112. The letter further notified Mr.

Hannon that the action taken resulted after an inspection of the property by the members of the Commission and after consideration of the evidence adduced at the public hearing on February 28, 1964, and the report of the Zoning Advisory Council dated February 27, 1964.

9. On December 18, 1963, Robert S. Nash, Donald S. Nash and The National Bank of Washington filed an application with the Zoning Commission for a change in the zoning of Squares W-4112, 4112, E-4112, 4110 and 4109 in the District of Columbia from R-1-B to C-M-1. Attached to this application were two affidavits, a plat and copies of correspondence between the Nashes and the Zoning Commission dated 1939 and 1940. Said application for rezoning was denominated file No. 63-90.

10. On December 19, 1963, Robert S. Nash, Donald S. Nash and The National Bank of Washington filed an application with the Zoning Commission for a change in the zoning of Square 4119 in the District of Columbia from R-1-B to C-M-1. Attached to said application were two affidavits, a plat and copies of correspondence between the Nashes and the Zoning Commission dated 1939 and 1940. Said application for rezoning was denominated file No. 63-91.

11. On January 23, 1964, William T. Hannan, attorney for Robert S. Nash, Donald S. Nash and The National Bank of Washington, was notified by letter that the Zoning Commission, on February 28, 1964, did conduct a public hearing on a proposal to change the zoning on Squares 4109, 4110, E-4112, 4112, W-4112 and 4119 from R-1-B to R-5-A or, alternatively, to change the zoning on said squares from R-1-B to R-3.

12. The notice set out in No. 9 above was in response to file No. 63-90 and 63-91.

13. In both file 63-90 and 63-91 the Zoning Commission, on January 31, 1964, notified William T. Hannan that the Zoning Commission in Executive Session on January 15, 1964, denied the applications of Robert S. Nash, Donald S. Nash and The National Bank of Washington

to amend the zoning map by changing the zoning from R-1-B to C-M-1 on Squares 4119, W-4112, 4112, E-4112, 4110 and 4109. Said notice states that the reasons for the denial would be forwarded to him at a later date.

14. On the applications numbered 63-90 and 63-91, the Zoning Commission, by letter dated February 20, 1964, notified William T. Hannan that the Zoning Commission in its Executive Session on January 15, 1964, denied the applications for changes in zoning on the subject squares and set forth in said notice the reasons for its action.

15. On March 11, 1964, the Zoning Commission, in a letter to Walter E. Washington, Executive Director, National Capital Housing Authority, a copy of which was forwarded to William T. Hannan, notified Mr. Hannan that it, on March 3, 1964, approved a change in zoning from R-1-B to R-3 on all of the lots in Squares 4119, 4109, 4110, E-4112, and W-4112. The letter further notified Mr. Hannan that the action taken resulted after an inspection of the property by the members of the Commission and after consideration of the evidence adduced at the public hearing on February 28, 1964, and the report of the Zoning Advisory Council dated February 27, 1964.

16. All exhibits attached to the affidavit of Robert O. Clouser which constitute the entire record made by the Zoning Commission of the District of Columbia in connection with its consideration of the application of the National Capital Housing Authority for a change in zoning on Square 4119 and the applications of Robert S. Nash, Donald S. Nash and The National Bank of Washington for a change in zoning on Squares 4119, 4109, 4110, E-4112, 4112 and W-4112.

Chester H. Gray
Corporation Counsel, D. C.

John A. Earnest
Assistant Corporation Counsel, D.C.

George H. Clark
Assistant Corporation Counsel, D.C.

Robert R. Redmon
Assistant Corporation Counsel, D.C.
Attorneys for Defendants

[Filed April 6, 1964]

MOTION TO DISMISS AMENDED COMPLAINT
OR IN THE ALTERNATIVE MOTION FOR
SUMMARY JUDGMENT

Come now the defendants, the United States of America, the National Capital Housing Authority, Walter M. Tobriner as its Executive Secretary and move the Court for an order dismissing the amended complaint or in the alternative for summary judgment in their favor for the following reasons:

1. This is an unconsented suit against the United States.
 - a. No statute authorizes suit against the United States to enjoin acquisition of land.
 - b. The National Capital Housing Authority is an agency of the United States and cannot be sued eo nomine.
 - c. The individuals defendants are sued in their official capacity to halt action which is within their authority and which is not constitutionally void.
2. The complaint fails to state a claim upon which relief may be granted.
 - a. A complaint to enjoin acquisition of land by the United States or its agents lacks equity.
 - b. No legal right vested in plaintiffs has been impaired by these defendants.

3. There is no genuine issue of material fact and defendants are entitled to judgment as a matter of law.

Incorporated herewith are the documents identified as D.C. Exhibits 1-7 and appended to co-defendants' motions.

David C. Acheson
United States Attorney

Charles T. Duncan, Principal
Assistant United States Attorney

Joseph M. Hannon
Assistant United States Attorney

Sylvia A. Bacon
Assistant United States Attorney

[Filed Apr. 6, 1964]

STATEMENT OF FACTS

Pursuant to Local Civil Rule 9(h), the United States of America, the National Capital Housing Authority, its Chairman and its Executive Secretary set forth the following material facts as to which there is no genuine issue:

1. Square 4119 in the District of Columbia is held in trust by plaintiffs. Amended Compl., p. 1, para. 2. It has been approved, pursuant to application on behalf of the National Capital Housing Administration, as a site for low rent public housing. Amended Compl., p. 3, para. 6.
2. The "Zoning Regulations of the District of Columbia" provide in Section 9101.2 that amendments to the Zoning maps may be proposed by the landowner or by the Zoning Commission, the National Capital Housing Authority and others as specified. D.C. Exhibit 6.

3. On December 3, 1963, an application for change of zoning for Square 4119 from R-1-B to R-3 was made on behalf of the National Capital Housing Authority by its Executive Secretary. Amended Compl., p. 3, para. 7.
4. On December 30, 1963, plaintiffs applied to change the zoning of Square 4119 from R-1-B to CM-1. Amended Compl., p. 4, para. 8. This application was rejected in Executive session on January 15, 1964. Walter M. Tobriner did not participate. D.C. Exhibit 7. On June 3, 1959 there had been a public hearing on an identical application. D.C. Exhibit 1.
5. No regulation of the Zoning Commission requires a public hearing on each application for zoning change. D.C. Exhibit 6.
6. Notice of hearing on a proposal to change Square 4119 and others from R-1-B to R-5 or alternatively to R-3 was given to plaintiffs and to these defendants on January 23, 1964. Amended Compl., p. 3-4, para. 9.
7. On February 28, 1964, hearing was had on the proposal described above. D.C. Exhibit 5.
8. On March 3, 1964, the Zoning Commission approved a change in the Zoning map which changed Square 4119 from R-1-B to R-3. Walter M. Tobriner did not participate. D.C. Exhibit 7.

David C. Acheson
United States Attorney

Charles T. Duncan, Principal
Assistant United States Attorney

Joseph M. Hannon
Assistant United States Attorney

Sylvia A. Bacon
Assistant United States Attorney

[Filed April 11, 1964]

AFFIDAVIT OF ROBERT O. CLOUSER

I, Robert O. Clouser, being first duly sworn, on oath, depose and say:

I am Director of Planning for the Zoning Commission of the District of Columbia and custodian of the records of that Commission.

I have examined the records of the Zoning Commission and state that the exhibits attached to this affidavit, and incorporated herein, are true records of the Commission:

Exhibit 1. Zoning File #59-13
Exhibit 2. Zoning File #63-84
Exhibit 3. Zoning File #63-91
Exhibit 4. Zoning File #63-90
Exhibit 5. Transcript of Zoning Commission hearing
on February 28, 1964.

Exhibit 6.-----The Zoning Regulations for the District of Columbia. [R. Redmon]

Exhibit 7. The minutes of the Zoning Commission in executive session on January 15, 1964 and March 3, 1964.

/s/ Robert O. Clouser
Director of Planning for the
Zoning Commission of the District
of Columbia

Subscribed and sworn to before me this 9th day of April, 1964.

/s/ Sylvia Tipp
NOTARY PUBLIC, D. C.

My Commission expires 9/14/68.

[Exhibit 1, page 3]

CASE #2

July 1, 1959

Mr. James C. Wilkes,
500 Tower Building,
Washington 5, D. C.

Dear Mr. Wilkes:

The Zoning Commission on June 16, 1959, denied your application to change from R-1-B to C-M-1 square 4119 entire, bounded by 17th, 18th and Bryant Streets and Montana Avenue, N. E.

In taking this action the Commission rejected the proposal of the Zoning Advisory Council that a change to R-3 be approved. A copy of the Council's report is enclosed for your information.

Yours very truly,

W. E. CHASE
Executive Officer.

Encl. 1

[Exhibit 1, page 4]

REPORT OF THE ZONING ADVISORY COUNCIL

CASE #2

JUNE 3, 1959, HEARING

"Change from R-1-B to C-M-1 square 4119 entire, bounded by 17th, 18th and Bryant Streets and Montana Avenue, N. E."

This is an application to change all except lots 1 to 4 square 4119. The remaining lots have been added for purposes of inspection and review.

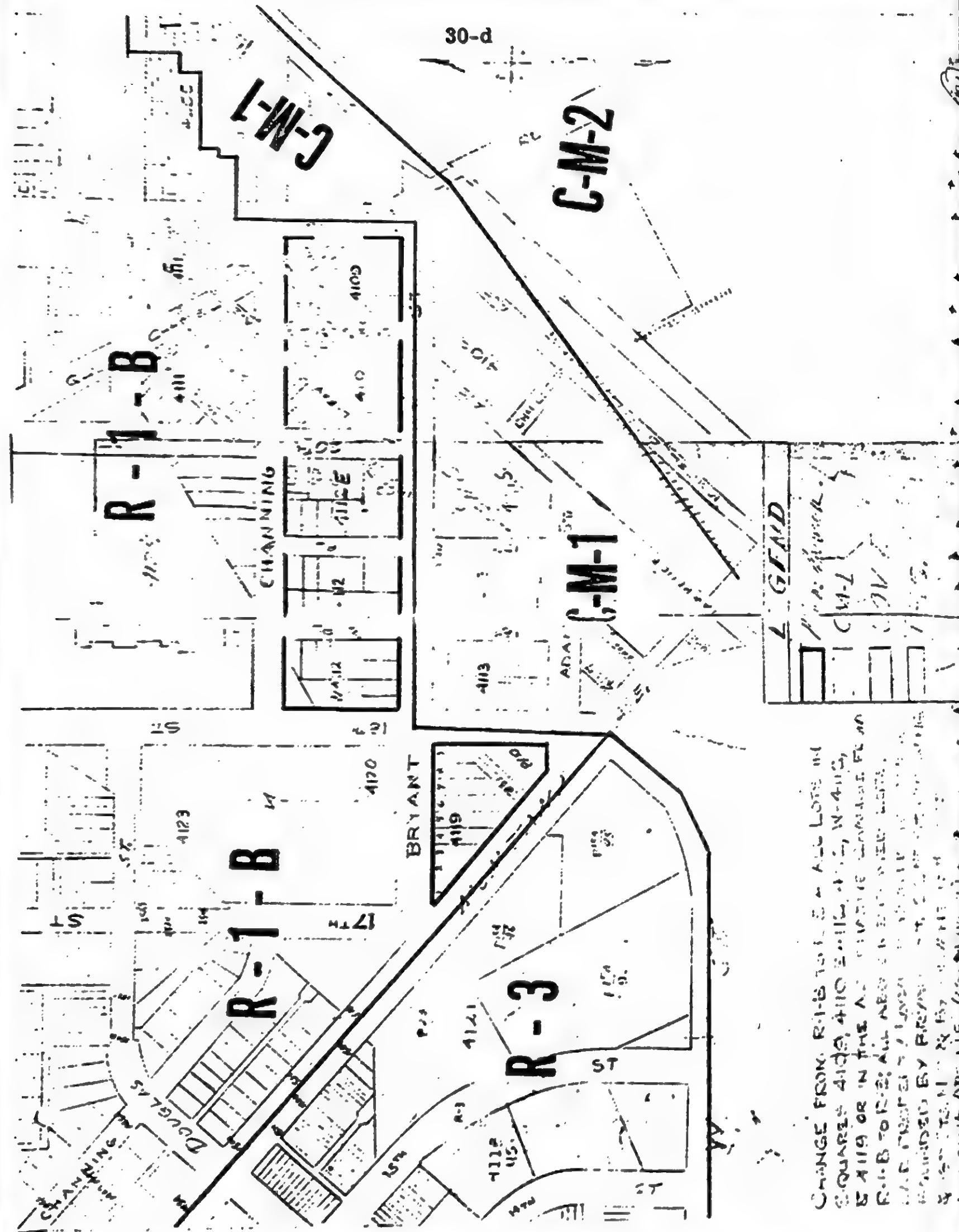
The entire square is zoned as recommended by Mr. Lewis. Squares 4113 and East of 4113 located east of the subject property were classified as C-M however, notwithstanding a Lewis recommendation of

R-1-B. This change was made because two small warehouses were under construction on land zoned Second Commercial prior to May 12, 1958. With the exception noted most of the surrounding area is unimproved although row and fully detached houses exist nearby.

In the opinion of the Council the change sought would be adverse to development with single-family dwellings of unimproved land to the north, west and south and planwise would be an unwarranted projection of unrestricted zoning into two one family districts. It is believed, however, that a change to a row house classification is completely realistic and justified on a planning basis.

It is therefore recommended that the proposal be denied and that a change to R-3 be approved.

(s) R. O. Clouser
(s) William F. McIntosh
(s) H. O. Webb, Jr.



[Exhibit 3, page 5]

File 63-91

December 31, 1963

Mr. William T. Hannan,
637 Woodward Bldg.
Washington 5, D. C.

Dear Sir:

Receipt of your letter dated December 19, 1963, with accompanying enclosures, requesting an amendment to the zoning map by changing from R-1-B to C-M-1, square 4119, is acknowledged.

The Zoning Commission will give your request careful consideration and you will be advised of its action at a later date.

Your very truly,

W. E. CHASE,
Executive Officer.

[Exhibit 4, page 5]

File 63-90

December 31, 1963

Mr. William T. Hannan,
637 Woodward Bldg.
Washington 5, D. C.

Dear Sir:

Receipt of your letter dated December 18, 1963, with accompanying enclosures, requesting an amendment to the zoning map by changing from R-1-B to C-M-1 squares W-4112, 4112, E-4112, 4110 and 4109, is acknowledged.

The Zoning Commission will give your request careful consideration and you will be advised of its action at a later date.

Yours very truly,

W. E. CHASE,
Executive Officer.

[Exhibit 7]

Filed April 11, 1964

Meeting of January 15, 1964

469th Session

The Zoning Commission met in the Office of the Engineer Commissioner at 2:30 p.m., on Wednesday, January 15, 1964.

All Members of the Commission except Mr. Stewart were present. Mr. George B. Hartzog, Jr., the newly appointed Member of the Commission replacing Mr. Wirth, was present.

Also present: Colonel Israelson and Colonel Adams, Asst. Engineer Commissioners, Mr. Robert O. Clouser, Director of Planning of the Commission, Mr. H. G. Ashton, Associate Planner of the Commission, Mr. William F. McIntosh from the National Capital Planning Commission, Messrs. George Clark and John Earnest from the Corporation Counsel's office, Mr. H. Warren Stewart, the Zoning Administrator and Mr. W. E. Chase, Executive Officer of the Commission.

The Commission approved the minutes of the 468th executive session held on December 13, 1963.

* * *

The Commission next authorized the following calendars for public hearings to be held on February 19th and 28th, 1964:

* * *

PROPOSED AMENDMENTS TO ZONING MAP

* * *

February 28, 1964 calendar:

* * *

2. Change from R-1-B to R-5-A all lots in sqs. 4109, 4110, E-4112, 4112, W-4112 and 4119 or in the alternative change from R-1-B to R-3 all of the above mentioned lots, said property located within the area bounded by Bryant St. 22nd, Channing and 18th St. N.E. and by Bryant, 18th St. and Montana Ave. N.E. (63-84, 90, 91).

* * *

Note: Mr. Tobriner did not vote on any of the cases involving the National Capital Housing Authority.

* * *

Meeting of March 3, 1964

470th Session

The Zoning Commission met in the Office of the Engineer Commissioner at 2:30 p.m., on Tuesday, March 3, 1964.

All Members of the Commission were present.

Also present: Colonel Israelson, Asst. Engineer Commissioner, Mr. Robert O. Clouser, Director of Planning of the Commission, Mr. H. G. Ashton, Associate Planner of the Commission, Mr. William F. McIntosh from the National Capitol Planning Commission and Mr. W. E. Chase, Executive Officer of the Commission.

* * *

The Commission next took up cases heard at public hearing held on February 28, 1964 (Action on these cases was unanimous unless otherwise indicated):

* * *

The application to change from R-1-B to R-5-A all lots in squares 4109, 4110, E-4112, 4112, W-4112 and 4119 or in the alternative change

30-h

from R-1-B to R-3 all of the above mentioned lots, said property located within the area bounded by Bryant Street, 22nd, Channing and 18th Streets, N.E. and by Bryant, 18th Street and Montana Avenue, N.E., was APPROVED as follows:

"All lots in square 4119, bounded by Bryant and 18th Streets and Montana Avenue, N.E., are changed from R-1-B to R-3, and all lots in squares 4109, 4110, E-4112, 4112 and W-4112, said property located within the area bounded by Bryant, 22nd, Channing and 18th Streets, N.E. are changed from R-1-B to R-5-A (63-84, 90, 91). (Mr. Tobriner not voting).

[Filed Apr. 22, 1964]

OPPOSITION TO MOTION OF DEFENDANTS,
ZONING COMMISSION OF THE DISTRICT OF
COLUMBIA, UNITED STATES OF AMERICA,
NATIONAL CAPITAL HOUSING AUTHORITY,
TO DISMISS OR IN THE ALTERNATIVE FOR
SUMMARY JUDGMENT

Plaintiffs' Amended Complaint asserts that the defendant, The Zoning Commission of the District of Columbia was secretly and otherwise "improperly influenced and impressed" by defendants, the United States of America and the National Capital Housing Authority, depriving plaintiffs of their right to rezoning, equal protection and due process under the Constitution.

In support of such assertion, plaintiffs attached to the pleadings a letter written by the Executive Director of the National Capital Housing Authority to the Zoning Commission, the last paragraph of which clearly demonstrates at least one attempt by the National Capital Housing Authority to secure to itself an eminently unfair advantage over the property owner. The existence of a set of circumstances under which one governmental agency feels free to seek from another such agency a secret agreement by which a private property owner is deprived of constitutional rights in his property, is deplorable. It is no less deplorable merely because such agreement is not, in fact, reached.

The request for such an agreement was accidentally discovered by plaintiffs. Upon its discovery, the request was termed "not applicable" by defendant National Capital Housing Authority and "withdrawn."

The mere seeking of such an agreement indicates a degree of rapport between the agencies which, intentionally or unintentionally, can only result in deprivation of the property owners constitutional rights.

Defendant, Zoning Commission, had before it for consideration on January 15, 1964, the application of both National Capital Housing

Authority and plaintiffs for rezoning of Square 4119. On that date it denied plaintiffs' application without hearing. On February 28, 1964, the Zoning Commission held a public hearing on the National Capital Housing Authority application for rezoning. On March 3, 1964, it approved the exact zoning requested by National Capital Housing Authority — R-3. On the same date, and on its own application, it approved a higher-use zoning (R-5-A) for five squares to the east of and diagonally contiguous to Square 4119, four of which are owned by plaintiffs (with minor exceptions). This action was taken by the Zoning Commission in the face of testimony at public hearing that the provisions of Article 75 of the Zoning Regulations would give the National Capital Housing Authority the effect of R-5-A zoning on Square 4119 after acquisition.

Thus, although the property owner appears to have been protected by the "withdrawal" of the request for delayed rezoning of Square 4119, its valuation upon condemnation proceedings will be based upon R-3 zoning and the National Capital Housing Authority can devote it to R-5-A use.

The Amended Complaint raises the issue whether or not the defendant, Zoning Commission, was secretly and otherwise improperly influenced by the defendant, National Capital Housing Authority, a powerful and influential government agency. Defendant, Zoning Commission, has characterized these assertions as "bare allegations" and "naked claim."

To the contrary, plaintiffs' amended Complaint pleads matters which raise genuine issues of fact.

Would the Zoning Commission have acted favorably upon plaintiffs' application in the absence of such improper pressure by the National Capital Housing Authority?

Did the fact that defendant, Walter N. Tobriner, did not participate in Executive Sessions of the Zoning Commission hearings involving National Capital Housing Authority application automatically

preclude the bringing of pressure, direct or indirect, from this quarter?

Defendants Zoning Commission and National Capital Housing Authority have in their exclusive possession knowledge and information concerning communications with the Zoning Commission with regard to Square 4119. The nature, form and frequency of such communications is of utmost importance to this Court in the ultimate determination of the issues raised, as well as determination of any jurisdictional question.

Defendants, Zoning Commission and National Capital Housing Authority have successfully thwarted every discovery attempt by plaintiffs. In essence, defendants' position seems to be that since plaintiffs have made only "bare allegations" and "naked claims" of facts which may or may not be supported by the depositions sought, defendants are entitled to summary judgment, because the taking of such depositions and eliciting of such facts would subject defendants to burdensome expense and inconvenience.

Consideration of motions for summary judgment must, therefore, be deferred to permit discovery proceedings by plaintiffs.

William T. Hannan
Counsel for Plaintiffs

[Filed May 18, 1964]

ORDER

Upon consideration of the Motion to Quash Notice to Take Deposition and Subpoenas Duces Tecum dated March 9, 1964, directed to Walter E. Washington, Joseph W. Hoban, Jr. and William R. Simpson, Jr. and the opposition thereto and the oral argument thereon, it is by the Court this 18th day of May, 1964

ORDERED that the notice to take depositions and the subpoenas duces tecum dated March 9, 1964, directed to Walter E. Washington, Joseph W. Hogan, Jr. and William R. Simpson, Jr. be and the same hereby are quashed.

R. B. Keech
United States District Judge

[Filed June 15, 1964]

ORDER

Upon consideration of the amended complaint, plaintiffs' motion for preliminary injunction, the exhibits attached thereto, the motion of the defendants, Walter N. Tobriner, Charles M. Duke, John B. Duncan, George B. Hartzog and J. George Stewart, members of the Zoning Commission of the District of Columbia, to dismiss or, in the alternative, for summary judgment on the amended complaint, the exhibits attached thereto, the memoranda of points and authorities in support of and in opposition to said motions and of oral argument by counsel in open Court, it is, by the Court, this 9th day of June, 1964,

ORDERED: That plaintiffs' motion for preliminary injunction be, and it is, hereby denied as moot and it is

FURTHER ORDERED: That the motion of the defendants, Walter N. Tobriner, Charles M. Duke, John B. Duncan, George B. Hartzog and J. George Stewart, members of the Zoning Commission of the District of Columbia, for summary judgment be, and it is, hereby granted, and the complaint be, and it is, hereby dismissed as to these defendants.

Wm. B. Jones
Judge

[Filed June 15, 1964]

ORDER

This matter having come before the Court on a motion by the United States of America, the National Capital Housing Authority, its Chairman and its Executive Director to dismiss or in the alternative for summary judgment and the Court having considered the amended complaint and the exhibits attached thereto, the instant motion together with plaintiffs' opposition, the pertinent exhibits, the memoranda of law and the oral argument of counsel, it is by the Court this 9th day of June, 1964

ORDERED that the motion of these defendants for summary judgment be and the same hereby is granted and it is

FURTHER ORDERED that the complaint against the United States of America, the National Capital Housing Authority, its Chairman and its Executive Director be and the same hereby is dismissed with prejudice and with costs awarded to defendants.

FURTHER ORDERED that plaintiffs' motion for preliminary injunction be and it is hereby denied as moot.

Wm. B. Jones
United States District Judge

[Exhibit "III"]

NATIONAL CAPITAL HOUSING AUTHORITY
Washington, D.C. 20430

December 3, 1963

Zoning Commissioners
Office of the Zoning Commission
District Building, Room 204
Washington 4, D.C.

Re: DC-1-44, Montana Avenue Location

Gentlemen:

In accordance with the provisions of Article 91 of the Zoning Regulations of the District of Columbia, the National Capital Housing Authority respectfully requests that the zoning of Square 4119, which is part of the site of the Proposed Montana Avenue Housing Project, be changed from R-1-B to R-3.

The area covered by this request is shown on the enclosed location map marked in red. The site location and site boundaries for this proposed public housing project were approved by the National Capital Planning Commission on September 13, 1962 and by the D.C. Board of Commissioners on December 6, 1962.

Square 4119 consists of approximately 1.58 acres on which we propose to erect thirty-six three-story four-bedroom row houses with appropriate off street parking.

Also enclosed is the Architects' site plan which shows the entire project area and illustrates that Square 4119 is a small part of the whole site which if re-zoned will contribute to achieving a pleasant arrangement of row houses and three-story walk-up apartments.

The Authority is of the opinion that the dwelling units we are proposing to erect would act as a buffer between the C-M-1 District with existing buildings of much greater bulk immediately adjacent on the southeast and the R-1-B District on the north side. The proposed development is also more open than the long row-house development existing in the R-3 District on the southwest side.

The District's need for housing for low-income families is urgent, as you know, and is likely to become even more so in the near future as more families are displaced. Locating suitable sites for the construction of public housing is a mounting problem for the Authority — a problem which we believe the District government may possibly be in a position to help solve. The re-zoning of the subject Square 4119 would be most helpful in making it economically feasible for the Authority to proceed with the construction of this housing project.

Although Paragraph 9101.22 of the Zoning Regulations specifically gives the Authority the right to propose a zoning amendment without requiring it to be the owner, we request that if the property is rezoned, the effective date of the rezoning action be made subsequent to the Authority's acquisition of title to the property.

Sincerely yours,

Walter E. Washington
Executive Director

[Exhibit "II"]

December 19, 1963

Zoning Commission,
District Building,
Washington, D. C.

Re: Application for re-zoning of Square 4119

Gentlemen:

Application is hereby made for a re-zoning of Square 4119 in Washington, D.C., from R-1-B to C-M-1.

The undersigned are the owners jointly or severally of all of squares 4119, W4112, E4112 and all but one lot of Square 4110. The undersigned do not own any of Square 4109; however, we feel that it

is in the interest of the owners of said square, as well as in the public interest, that Square 4109 be included in this application for re-zoning.

The following documents are filed herewith and prayed to be considered by the Zoning Commission as a part of this zoning application:

1. Affidavit of Charles C. Koones
2. Affidavit of Robert S. Nash and Donald S. Nash
3. Plat
4. Photostatic copies of correspondence between the undersigned and the Zoning Commission in 1939 and 1940.

Very truly yours,

Robert S. Nash

Donald S. Nash

NATIONAL BANK OF WASHINGTON,

BY:

December 18, 1963

Zoning Commission,
District Building,
Washington, D.C.

Re: Application for re-zoning of Squares W4112,
4112, E4112, 4110 and 4109

Gentlemen:

Application is hereby made for a rezoning of Squares W4112, 4112, E4112, 4110 and 4109 in Washington, D.C. from R-1-B to C-M-1.

The undersigned are the owners jointly or severally of all of squares 4119, W4112, 4112, E4112 and all but one lot of Square 4110. The undersigned do not own any of Square 4109; however, we feel that it is in the interest of the owners of said square as well as in the public interest, that Square 4109 be included in this application for re-zoning.

The following documents are filed herewith and prayed to be considered by the Zoning Commission as a part of this zoning application:

1. Affidavit of Charles C. Koones
2. Affidavit of Robert S. Nash and Donald S. Nash
3. Plat
4. Photostatic copies of correspondence between the undersigned and the Zoning Commission in 1939 and 1940.

Very truly yours,

Robert S. Nash

Donald S. Nash

NATIONAL BANK OF WASHINGTON,
BY:

AFFIDAVIT

DISTRICT OF COLUMBIA, SS:

I, CHARLES C. KOONES, being first duly sworn depose and say:

I have been a real estate appraiser in the District of Columbia for more than thirty (30) years, having resided in the District all my life; that I have performed appraisals for the leading financial institutions in the District and elsewhere, including The Riggs Bank, American Security and Trust Co., National Savings and Trust Co.; that I have appraised for the District of Columbia and the Department of Justice; that I have appraised the Press Building, the Universal Building, the Farragut Building, among others; that I am Chairman of the Economic Development Committee of the Washington Board of Trade; that I am a member of the Board of the Central Business District Group of the Urban Land Institute; that I was formerly President, Washington Real Estate Board, former President of the District of Columbia Chapter of the American Institute of Real Estate Appraisers, and a member of the American Society of Real Estate Counsellors;

That I am familiar with the Northeast quarter of the city of Washington, D.C., and particularly with the property located near the National Lutheran Home and the holdings of Donald S. Nash, Robert S. Nash and the National Bank of Washington, in the vicinity of Montana Avenue, N.E., known as Squares E4112, 4112, W4112, 4110 and 4119.

That when said property was re-zoned under the Lewis Plan in 1958, the existing zoning was Residential 40' "B", permitting the construction of apartment houses; that the 1958 Lewis Plan designated the area R-1-B, further restricting occupancy of the property;

That it is the opinion of this affiant that the District of Columbia needs more land available for commercial or light industrial use; that, otherwise, the city will not attract additional workers due to lack of employment opportunities;

That a study of the neighborhood immediately to the south of the properties in question reveals that the area is rapidly becoming devoted to light industrial uses, resulting in a general deterioration of the single family dwelling uses on the perimeter of such light industrial area. The existence of what amounts to industrial zoning immediately adjacent to single family dwelling zoning is contrary to the basic principals of zoning and rarely found duplicated in the District of Columbia.

That for the reasons hereinbefore enumerated, this affiant is of the opinion that the highest and best economic use to which said property can be devoted is light industrial; that the Zoning Regulations of 1958 erred in designating W4112, 4112, E4112, 4110 and 4119 as R-1-B; that light industrial zoning is badly needed by the District in order to compete with the large amount of industrially-zoned land in the surrounding counties; that today, the supply of such land in the District of Columbia being limited, higher prices (in fact, monopolistic prices) are being demanded; whereas, an adequate supply of light

industrial land in the District of Columbia would afford a wider selection of sites and, because of this, more reasonable prices.

Charles C. Koones

I, CHARLES C. KOONES, being first duly sworn on oath, depose and say that I have read over the foregoing Affidavit by me subscribed and verily believe the same to be true.

Charles C. Koones

Subscribed and sworn to before me this 18th day of December, 1963.

Platere T. Gedney
Notary Public, D.C.

AFFIDAVIT

DISTRICT OF COLUMBIA, SS:

We, DONALD S. NASH and ROBERT S. NASH being first duly sworn depose and say:

That we are the owners, with the National Bank of Washington (under a joint venture agreement) of squares W4112, 4112, E4112 and 4119 and have owned said properties since about 1930; that Donald S. Nash resides at 1816 Bryant Street, N.E. (square 4112);

That in 1940, all of said property was zoned residential 40' "B", permitting construction of apartments thereon; that to the south of said property, extending from Bryant Street to the Baltimore and Ohio Railroad tracks and from 18th Street east to Loomis Park, the area was zoned second commercial; however, said property was wooded and not devoted to commercial use. In 19 , Langdon Mill Lumber Company was built at the east end of Bryant Street near the B & O Railroad tracks; later a warehouse was erected on Lawrence Avenue, south of Langdon Mill Lumber Company. In 19 , the J. Brenner & Sons scrap iron yard occupied 2201 Lawrence Avenue, N.E., engaging in pressing and baling of scrap metal; the Potomac

Electric Power Company then constructed a sub-station on Lawrence Avenue at Edwin Street; that more recently, however, the following commercial uses have taken place in the immediate vicinity:

Pepperidge Farms Bread on Adams Street, since 1955; Calevas Laboratories, 1880 Adams Street, N.E., in 1957; W. W. Grainger, manufacturers of electrical motors, at 1860 Adams Street, N.E., since 1958; Armor Elevator Company, 1850 Adams Street, N.E., in 1958; Art Display Company at 2315 18th Place, N.E., in 1959; Andrews Paper Company at 2335 18th Street, N.E., since 1959; Chung Wah Noodle Factory at the corner of Lawrence and Adams Streets since 1960; Sid Harvey's, dealing in heater equipment, 1800 Adams, N.E., since 1960; Arrow Printing Company, 1851 Adams, N.E. since 1961; Blaydes Lock Company, now under construction at 2325 18th Place, N.E.

Other commercial uses in the immediate vicinity are the Del Grosso Iron Works, 2325 18th Street, N.E.; Montana Double Car Wash at 2327 18th Street, N.E.; Hamilton and Spiegel, Inc., sheet metal works, 1810 Edwin Street, N.E., an auto repair shop on Edwin Street near Lawrence Avenue; Duvall Scaffolding Company, 2218 Lawrence Street, N.E.

In our opinion, it would be economic suicide to further develop the said squares in accordance with the existing zoning. Such an attempt was made in the late 1930's, before more than token commercialization had taken place on the adjoining property. The disastrous results are reflected in our correspondence with the Zoning Commission under date of December 14, 1939, copies of which are attached hereto.

Donald S. Nash

Robert S. Nash

DISTRICT OF COLUMBIA, SS:

DONALD S. NASH being first duly sworn on oath deposes and says that he has read over the foregoing Affidavit by him subscribed and verily believes the same to be true.

JA.43

Subscribed and sworn to before me this day of December, 1963.

Notary Public, D.C.

DISTRICT OF COLUMBIA, SS:

ROBERT S. NASH being first duly sworn on oath deposes and says that he has read over the foregoing Affidavit by him subscribed and verily believes the same to be true.

Subscribed and sworn to before me this day of December, 1963.

Notary Public, D.C.

Files 63-84, 90, 91

CASE #2

January 23, 1964

Mr. William T. Hannan,
637 Woodward Building,
Washington 5, D. C.

Dear Mr. Hannan:

The Zoning Commission will hold a public hearing to consider amendments to the zoning map on Friday, February 28, 1964, beginning at 10:00 a.m., in Room 500, District Building. The proposal to change from R-1-B to R-5-A all lots in squares 4109, 4110, E-4112, 4112, W-4112 and 4119 or in the alternative change from R-1-B to R-3 all of the above mentioned lots, said property located within the area bounded by Bryant Street, 22nd, Channing and 18th Streets, N.E. and by Bryant, 18th Street and Montana Avenue, N.E., is listed as item #2 on the agenda of the Zoning Commission.

Yours very truly,

W. E. CHASE,
Executive Officer.

File 63-91

January 31, 1964

Mr. William T. Hannan,
637 Woodward Bldg.,
Washington 5, D. C.

Dear Mr. Hannan:

The Zoning Commission in executive session held on January 15, 1964 denied your application to amend the zoning map by changing from R-1-B to C-M-1 square 4119, for reasons which will be forwarded to you at a later date.

The Commission did, however, grant a hearing on this square to change from R-1-B to R-5-A or in the alternative from R-1-B to R-3 as contained in my letter to you dated January 23, 1964.

Yours very truly,

W. E. CHASE,
Executive Officer.

File 63-90, 63-91

February 20, 1964

Mr. William T. Hannan
637 Woodward Building
Washington 5, D. C.

Dear Mr. Hannan:

The Zoning Commission in executive session held on January 15, 1964, denied your application to amend the zoning map by changing from R-1-B to C-M-1 squares 4119, W-4112, 4112, E-4112, 4110 and 4109.

The Zoning Commission in denying this application concluded that additional industrial type zoning is unneeded particularly in this general area since approximately 1/3 mile distant to the east of the sites, well in excess of 30 acres of industrial land has not as yet been developed for any purpose; that there exists in the District of Columbia C-M Districts exceeding 9% of the city's total zoned area, more than half of which is not used for C-M purposes; and that a rezoning of the

squares involved is completely unjustified on any legitimate planning basis since the area involved is one of transition. A change to C-M zoning under these circumstances would do no more than transfer the transition problem to the next adjoining squares to the north and west. In addition, the Zoning Commission has already held a public hearing to change the zoning of square 4119 from R-1-B to C-M, which hearing was held on June 3, 1959, following which a denial was entered based essentially upon a finding that the proposed change would have been adverse to existing single-family dwellings lying nearby to the north and west. This conclusion was called for in part by substantial neighborhood protest.

Yours very truly,

WILLIAM E. CHASE
Executive Officer

DISTRICT OF COLUMBIA ZONING COMMISSION
PUBLIC HEARING - Friday, February 28, 1964.

MR. ASHTON: Case No. Two reads as follows:

(Mr. Ashton Read Insert #2 Which Appears
on the Following Page of the Transcript.)

February 28, 1964 — Hearing

CASE NO. 2

"Change from R-1-B to R-5-A all lots in squares 4109, 4110, E-4112, 4112, W-4112 and 4119 or in the alternative change from R-1-B to R-3 all of the above mentioned lots, said property located within the area bounded by Bryant St., 22nd, Channing and 18th Sts., N.E. and by Bryant, 18th St. and Montana Ave., N.E."

These are alternate proposals authorized for consideration by the Zoning Commission at its Executive Session held on January 15, 1964. The Commission's directive to list these items at public hearing arose from applications of the owners of squares 4119, W-4112, 4112, E-4112 and all but one lot in square 4110 to rezone the properties to C-M-1.

Square 4109 although not owned by the applicants, was included in one of the requests. The National Capital Housing Authority is also interested in square 4119 and has requested a change of the zoning of this square to R-3 as a part of a proposed public housing development. The Authority has neither equitable nor legal title to this square.

The Zoning Commission in rejecting the application to rezone these squares to C-M-1 concluded that additional industrial type zoning is unneeded particularly in this general area since approximately 1/3 mile distant to the east of the sites, well in excess of 30 acres of industrial land has not as yet been developed for any purpose; that there exists in the District of Columbia C-M Districts exceeding 9% of the city's total zoned area, more than half of which is not used for C-M purposes; and that a rezoning of the squares involved in this application is completely unjustified on any legitimate planning basis since the area involved is one of transition. A change to C-M zoning under these circumstances would do no more than transfer the transition problem to the next adjoining squares to the north and west. In addition, the Zoning Commission has already held a public hearing to change the zoning of square 4119 from R-1-B to C-M, which hearing was held on June 3, 1959, following which a denial was entered based essentially upon a finding that the proposed change would have been adverse to existing single-family dwellings lying nearby to the north and west. This conclusion was called for in part by substantial neighborhood protest.

As stated, all of the area involved is transitional in character and thus justifies in the opinion of the Council consideration of some appropriate transition treatment. Factually, square 4119 is totally unimproved. Squares W-4112 and 4112 are improved with one dwelling. Squares E-4112 and 4110 are improved with a number of dwellings erected by one of the applicants and presumably leased or rented. Square 4109 is improved with six four-family flats facing on Queens Chapel Rd. and on 21st Pl. The southerly part of this square although

partially improved with old dwellings had deteriorated substantially by reason of existing industrial operations opposite. Any residential development of this frontage, the Council believes, would be completely impracticable and should be considered for C-M zoning at some future proceeding.

With the exception of square 4119 the five remaining squares were located in a low-density apartment district prior to the Lewis revision of 1958. Square 4119 was a part of a medium density apartment district prior to this date.

The Council has carefully inspected this area and has noted recent C-M development in squares 4113 and E-4113 which lie opposite three of the squares involved in the proposal now before the Commission. It is our conclusion that none of these three squares nor the two others owned by the original petitioners are likely to be developed with single-family, row dwellings, the type of development which would be permitted under an R-3 classification. We believe also that the existing R-1-B zoning of these properties is completely unrealistic. On the other hand the Council is of the opinion that low density R-5-A apartment construction except on the southerly part of square 4109 previously noted, would be a practical and logical transitional treatment consistent with and balancing other development of all types both existing and probable in this general neighborhood. It is recommended, therefore, that the zoning of all of the squares involved be changed to R-5-A subject to consideration of a C-M-1 change of a portion of square 4109 at some future date.

R. O. CLOUSER

WILLIAM F. McINTOSH

JOHN A. ISRAELSON

MR. ASHTON: (Continues) The Citizens' Zoning Advisory Committee recommended approval with one abstention of the rezoning as indicated below, that is: Rezone square 4119 from R-1-B to R-3 and re-

zone squares W-4112, 4112, E-4112, 4110 and 4109 from R-1-B to R-5-A.

The Committee has stated a discussion here, do you want that read, Mr. Chairman.

CHAIRMAN DUKE: Please do for the benefit of the public.

MR. ASHTON: The Committee, while recognizing the advantage of using rezoning to encourage neighborhood development, was concerned with the adequacy of school facilities to accommodate the increased school population resulting from increased density. The Committee, however, acknowledged that recognition of school needs was a responsibility of the Board of Commissioners in that the Board had approved the large public housing development west of the area now being considered. The Committee agreed that increased density could be accommodated assuming adequate public supporting facilities would be provided. In making its recommendation the Committee sought to establish its own bounding -- its own boundaries with less gerrymandering.

(Brief Off the Record Discussion by Members of the Commission)

CHAIRMAN DUKE: In other words, the Zoning Advisory Council recommends approval of the request except for a portion of Square 4109?

MR. ASHTON: Yes, consideration of the southerly part of 4109 to be considered at a later hearing.

CHAIRMAN DUKE: But at this particular hearing they are approving only the request of the whole area except for 4109?

MR. ASHTON: This is an alternative.

CHAIRMAN DUKE: Now that I have succeeded in confusing everyone we will now hear from the proponents of the request? I am sorry to interrupt you, Mr. Ashton.

I would first like to ask before we hear the testifying in behalf of the application are there witnesses here who wish to testify in opposition to this request?

(Several People in the Audience Raised Their Hands.)

MR. ASHTON: There is some opposition.

* * *

MR. ASHTON: One moment, Mr. Chairman, there is a statement by the Washington Board of Realtors they wish read into the record.

CHAIRMAN DUKE: We'll have the reporter insert that as part of the record and just file it, please.

(Reporter's Note: The following is a statement of Thomas M. Walsh, President, Washington Board of Realtors on Case No. Two.)

"Mr. Chairman and Members of the Commission:

"My name is Thomas M. Walsh and I am President of the Washington Board of Realtors and appear here on behalf of that Board and its more than 1,100 members operating in the District of Columbia.

"The Zoning Committee of the Board studied the proposed amendments to the zoning map that are to be considered here today and make the following recommendations:

'In Appeal No. 2 (63-84, 90, 91) which requests a change from R-1-B to R-5-A all lots in Squares 4109, 4110-E-4112-4112-W-4112 and 4119, or in the alternative change from R-1-B to R-3, all the above mentioned lots, said property located within the area bounded by Bryant Street, Twenty-Second Street, Channing and Eighteenth Streets, N.E., and by Bryant Street, Eighteenth Street and Montana Avenue, Northeast. We are of the opinion that this appeal should be granted for a change to R-5-A or the alternative R-3, because most of this ground is vacant, and lies just west of an industrial area, and to the north of Montana Avenue and Eighteenth Street.' It would appear the R-3 classification for row houses might be more in conformity with the surrounding area than R-5-A would, for low density apartments. We feel that neither change should hurt the Lutheran Home, in the area.'

CHAIRMAN DUKE: Thank you.

The Witness Takes the Stand.

CHAIRMAN DUKE: Mr. Washington, would you proceed, sir?

MR. WALTER E. WASHINGTON: Thank you, Mr. Chairman and Members of the Commission. So that we can be clarified ourselves I would simply like to indicate that our request was for rezoning to R-3 of one triangle of Square which is shown here known as Square 4119 -- this is our request simply.

COMMISSIONER TOBRINER: Would the rezoning of that far side of the Zoning Advisory report to rezone that side interfere with your proposed request?

MR. WASHINGTON: Well, we're not certain of that at this time. We haven't studied this out in terms of the impact that it might have on the land costs.

COMMISSIONER TOBRINER: Would you submit a statement on that?

MR. WASHINGTON: Yes, sir.

I appear today -- the name is Walter Washington, Executive Director of the National Capital Housing Authority and I appear here today in support of the Authority's request that the zoning of Square 4119, Northeast, be changed from R-1-B to R-3. This request is made in accordance with Article 9101.22 of the zoning regulations which provides that amendments to the zoning map be proposed by the District of Columbia, the Redevelopment Land Agency or the National Capital Housing Authority without ownership of the property for which amendments are being proposed. In this connection we requested that the effective date of such rezoning action be made subsequent to the Authority's acquisition of the property. We understand that this request is not applicable and we hereby withdraw it.

Now I might say that in our letter we asked that the effected date of such zoning action be subsequent to the Authority's acquisition of the property. We find that this request is not applicable under this provi-

sion. So that all we have before the Zoning Commission is the bare question of rezoning of Square 4119 from R-1-B to R-3.

I have asked Mr. Henry Davenport, Director of Project Development, to present the technical statement for the authority and he is supported on his left by the architect, Mr. Louis Fry who would be available for any questions.

Mr. Davenport.

The Witness Takes the Stand.

MR. HENRY F. DAVENPORT: Square 4119 together with Square 4121 was approved as a site for a low rent, public housing project by the National Capital Planning Commission on September 13, 1962, and by the District Commissioners on December 6, 1962. Square 4119 is now zoned R-1-B which restricts its use to one-family detached dwellings.

Our studies indicate that to be economically feasible the project must consist of not less than 155 dwelling units to be contained in three story apartments. One hundred and seventeen units would be in Square 4121 on the opposite side of Montana Avenue from Square 4119. Square 4121 is zoned R-3 which would permit three-story buildings as planned. The remaining 38 units, also in three-story apartments, would be in Square 4119 which is the only portion for which rezoning is being requested.

We believe this request to be a reasonable one, and that the proposed change would merely extend the R-3 zoning of Square 4121, south of Montana Avenue, to Square 4119 on the opposite side of the street. The zoning of the area abutting Square 4119 on the northeast and east is C-M-1.

This and other projects in various stages of development will provide urgently needed dwellings for families desperately in need of housing, many of whom are scheduled for displacement by urban renewal, code enforcement, highway construction and other public works projects. We already have on our waiting list at this time nearly four-hundred such displaced families who are awaiting suitable dwellings. Since the loss

of as few as 38 units would further aggravate the serious relocation and rehousing problem, I strongly urge that this request for rezoning be granted so that the development of this project may proceed on the basis of 155 dwelling units as planned.

MR. WASHINGTON: Mr. Chairman, if we may proceed, Mr. Louis Fry, the architect, will give you the proposed plan of how this fits into the area.

(The Witness Uses a Plat in Testifying)

MR. LOUIS FRY: Louis Fry -- F-R-Y.

CHAIRMAN DUKE: May I make absolutely certain, Mr. Washington, and to clarify in everybody's mind here this morning this rather complicated arrangement that we are entering into. Your application centers around solely this one square 4119 --

MR. WASHINGTON: 4119, yes. That's all we have involved and if I might have Mr. Fry show the major portion of the site which is currently R-3 and represents the bulk of the project. Across the street is the only part that is involved for rezoning --

CHAIRMAN DUKE: Rezoned into the R-3 --

MR. WASHINGTON: Into the R-3 category. Yes.

MR. LOUIS FRY: Now essentially we have a three story building with row houses here (indicating on the plat). Now these are two and three story houses over here. The bulk of the plan in this area is now R-3 and as you see three story here.

Thank you.

MR. WALTER WASHINGTON: I think that concludes our testimony.

CHAIRMAN DUKE: Thank you very much.

MR. WALTER WASHINGTON: Thank you, Mr. Chairman.

CHAIRMAN DUKE: I would like to ask that any supplemental information that will be submitted be sent in by the close of business on Monday. Mr. Washington, is that all right with you to submit your information by the close of business, Monday?

MR. WASHINGTON: Yes, sir.

CHAIRMAN DUKE: All right, we will hold the record open until Monday on this case.

Next.

The Witness Takes the Stand.

MR. NORMAN GLASGOW: Mr. Chairman and Members of the Zoning Commission, my name is Norman M. Glasgow. I appear here on behalf of the National Lutheran Home. They are the owners of Lot 800 in Square W-4112. That is the portion that I am pointing to and indicating on the exhibit plat.

CHAIRMAN DUKE: 4112-W.

MR. GLASGOW: W-4112. Yes, sir. It's the little triangular sliver in the upper northwest corner of that square.

CHAIRMAN DUKE: The corner of Channing and 18th Street?

MR. GLASGOW: Right.

Mr. Chairman, the National Lutheran Home supports a change of zoning to R-5-A. The Home points out that the National Capital Housing plan for development in the area is for multi-family use. If this is to go through that is irrespective of what zoning change they accomplish and they would seek apartment house use of the property. This is possible under the zoning regulations --

(Brief Pause)

MR. GLASGOW: I'll wait.

CHAIRMAN DUKE: I'm sorry.

MR. GLASGOW: That's all right. I wanted to hold up because it is a little bit technical here -- a technical argument here -- and I think the Commission will see the validity and justification of our argument on this point.

The National Capital Planning -- National Capital Housing Authority is seeking through its rezoning to develop its property for a multi-family use. To this the National Lutheran Home is not opposing any objection. But we point out that the only way that is possible under the zoning regulations that they are going to proceed under Article 75 of the zoning

regulations which permits such development for tracts of land of five acres or more. Now if the remaining land that is involved in this application were to be zoned R-3 those property owners would not be able to put their land to the same use. They would be restricted to row houses, semi-detached houses or single family dwellings. So that the only way the adjoining property owners can get the same type of multi-family use that would be developed or available to the National Capital Housing Authority would be to zone the remaining land R-5-A and on the basis of equity and fairness we respectfully submit that that is the appropriate and reasonable zoning for the subject site.

I trust that I made my point clear and I am sure if the Commission carefully analyses the limited uses specified in the R-3 zoning classification as set forth of page 12 of the zoning regulations my point will be immediately apparent.

COMMISSIONER DUNCAN: I take it, Mr. Glasgow, that the withdrawal of the portion of the application having to do with the other four squares have had no effect on your position at all? We understood that the applicant withdrew the next -- withdrew that portion except 4119?

MR. GLASGOW: I wasn't aware of that fact.

(Off the Record Conference by the Commission Members.)

COMMISSIONER DUNCAN: A deferral I guess it is of the other property.

MR. WASHINGTON: We did not comment on the other portion. We were concerned only with 4119.

MR. GLASGOW: If the Commission wishes me to submit any further I will be happy to submit that in writing, but I think my point is apparent and obvious.

COMMISSIONER DUNCAN: I think we're straightened out. Thank you.

CHAIRMAN DUKE: We understand what you say, Mr. Glasgow, we don't necessarily agree with you all the time but all the time your statements are clear and concise and we understand. Thank you, sir.

MR. GLASGOW: Thank you, Mr. Chairman.

CHAIRMAN DUKE: I doubt if the Commission will ask for anything further from you but if you have anything on your own go right ahead and submit it.

MR. GLASGOW: I just wanted to make it clear that in order for us to get the same treatment as the neighboring property owners it would necessitate R-5-A zoning.

CHAIRMAN DUKE: We hear you. Thank you, sir.

Next.

(Off-the-Record Conference by the Commission Members.)

CHAIRMAN DUKE: Mr. Glasgow, would you please return to the stand? We would like to ask you some questions.

I think Mr. Hartzog has a question he would like to ask you but keep in mind that the request of Mr. Washington was to rezone 4119 to R-3 and the request before the Commission is to rezone the entire area either R-5-A or R-3.

MR. GLASGOW: Yes, sir.

COMMISSIONER DUNCAN: And your position is that the property in which you are interested in not be R-5-A -- if R-5-A that is --

MR. GLASGOW: Restricted to either single family, semi-detached or low houses.

MR. DUNCAN: And therefore you oppose R-3?

MR. GLASGOW: Yes, sir. We would not want Square W -- whatever the number is --

MR. DUNCAN: 4112.

MR. GLASGOW: Yes, sir. We do not feel that would be a fair zoning change.

CHAIRMAN DUKE: And just leave it R-1 the way it is now, you don't think that would be proper do you?

MR. GLASGOW: No, sir.

CHAIRMAN DUKE: In other words, you are making a request and supporting the request for the rezoning of only one square or all of the top squares or specifically what is your request to zone for R-5-A?

MR. GLASGOW: I speak for only one property owner and I would not want to comment as to other people's property but the logical thing to me just speaking from some experience in the matter would be to consider the National Capital Housing application as restricted only to the square they are interested in and as I understand it they are not pursuing R-3 zoning for any of the other squares. They have interest only in one, so I ask that the Zoning Commission not consider R-3 for any of the other squares but to confine the zoning to R-5-A and I think all property should be R-5-A with possibly the exception of the triangular piece that the National Capital Housing is seeking and there I would raise some question of whether that shouldn't be R-5-A too but I am not involved in that.

COMMISSIONER DUNCAN: Yes, I —

MR. HARTZOG: May I ask then why you take this position? In other words, what — as I understood you to say earlier that they were going to have multi-family housing in the R-3 which they asked for?

MR. GLASGOW: Yes, sir.

MR. HARTZOG: And that under the same R-3 you would not be able to add, is that what you mean?

MR. GLASGOW: That's right because the zoning regulations under Article 75 state that if you have five acres of land or more you can take and use it for multi-family use and the National Capital Housing I am certain is going to proceed — they can correct me if I'm in error — they are going to proceed under Article 75 for a large scale plan of development; otherwise, they cannot either —

MR. HARTZOG: Well, that's what I am trying to develop. There's no distinction here between public housing and private housing?

MR. GLASGOW: No, sir.

MR. HARTZOG: They're proceeding under the basis that if they

put this plot in conjunction with other plots there and this would tie in?

MR. GLASGOW: That is correct.

MR. HARTZOG: If you get the same R-3 you would not be able to do this?

MR. GLASGOW: That's correct and there would not even be in the other assemblage —

MR. HARTZOG: R-5-A then would permit you to develop similar kinds of housing —

MR. GLASGOW: It would be multi-density with — multi-family with a somewhat higher density — .65 FAR for garden type of apartments in the R-5-A District and R-3 it would be .4 — so we're speaking —

MR. HARTZOG: I understood you to say that if they get the R-3 you have to have R-5-A in order to be treated equitably and I didn't understand this.

MR. GLASGOW: I still stand on that statement.

MR. HARTZOG: Yes, but you're getting a higher density under the R-5-A than R-3.

MR. GLASGOW: Yes, sir, we would but there would be no way to have multi-family use other than under that classification. That's the point.

Thank you.

CHAIRMAN DUKE: Anyone else to testify in behalf of the application?

NO RESPONSE.

CHAIRMAN DUKE: All right, opposed?

MR. LEWIS S. TERRY: Mr. Chairman and Members of the Zoning Commission, I am Lewis S. Terry, Chairman of the Zoning Committee for the Woodridge Civic Association with a membership of over 1,025 property owners. The Woodridge Civic Association has requested that no change be granted in the zoning of lots in the following squares: 4109, 4110, E-4112, 4112, W-4112, and 4119 from R-1-B to R-5-A or R-3. This request was voted by the Association on Tuesday, February

4, 1964 and granting this change would bring about further overcrowding of public school facilities.

* * * * *

NEXT WITNESS TAKES THE STAND.

MR. BERNARD H. NELSON: My name is Bernard H. Nelson and I am a resident of 1509 Channing Street, Northeast, which is approximately 300 yards from one of the proposed sites. I speak as a representative for approximately twenty-nine property owners and home owners who live three blocks immediately adjacent to 4119.

* * * * *

MR. NELSON: Now we object to any zoning change that will permit the construction of a number of multiple, high population density family units in the three to six room category as proposed by the National Capital Housing Authority. We object because it would make the area an impacted one where existing facilities are already overburdened. Moreover, permission to construct exclusively three, four, five and six bedroom units six bedroom units such as are proposed for squares 4119 and 4121, rather than a more balanced plan that would include smaller one and two bedroom units, seems to be an experiment without precedent in any other city of the country. The impact of such a large population concentrated in this small area could have none but adverse effects on the community.

* * * * *

The next witness, please.

THE WITNESS TAKES THE STAND.

MR. LEROY FORD:

* * * * *

The area in question recently underwent an inspection for housing violations — Brentwood Conservation — with a view toward preventing deterioration of the area into one blight. To downgrade the zoning restrictions of the areas as proposed would in our opinion negate the purpose of the Brentwood Conservation program and only hasten the time

when the area would become blighted. The area is already overcrowded with children due to recent racial changes in the neighborhood and the building of approximately eighty to one-hundred row type houses within the past three to five years. The schools are already overcrowded and the relatively new Brentwood Playground is also overcrowded and neither can accomodate the large number of additional children anticipated through construction of public housing in the squares under question.

* * *

NATIONAL CAPITAL HOUSING AUTHORITY
Washington 25, D. C.

March 2, 1964

Zoning Commission
District of Columbia
District Building
14th and E Streets N. W.
Washington, D.C. 20004

Re: DC-1-44, Montana Avenue Location

Gentlemen:

Pursuant to the Zoning Commission's request at the public hearing on Friday, February 28, we are submitting staff observations on the suggested change of zoning to R-5-A rather than R-3.

As an alternative to our request for a change in zoning of Sq. 4119 from R-1-B to R-3, the Zoning Advisory Council has suggested a change from R-1-B to R-5-A. We would much prefer R-3 zoning for a number of reasons:

1. We have not developed planning studies on the basis of R-5-A and therefore we are not in position at this time to definitely assess the results of R-5-A on the feasibility of development of the total project.

2. The general appraisal of the staff at this time indicates the following:
 - a. The higher density which would be necessary to offset the possible increase in the cost of the land if zoned R-5-A would necessitate the use of small (1- and 2-bedroom) units for which the need is less than for the larger (3-, 4-, 5-, and 6-bedroom) units planned for this site. The smaller unit addition might clearly cause the Public Housing Administration to raise a question of development feasibility based on appropriate unit distribution.
 - b. An appreciable increase of the total number of units in the project which would result from a higher density in Sq. 4119, would require a revised Development Program to be prepared and submitted to the Public Housing Administration for approval, further delaying the development of the project which is already seriously behind schedule.

As we testified at the public hearing on February 28, 1964, we believe our request to be a reasonable one since it would merely extend the R-3 zoning of Square 4121 on the south side of Montana Avenue to Square 4119 opposite on the north.

Based on the foregoing, we repeat our request that Square 4119 be rezoned from R-1-B to R-3.

Sincerely yours,

/s/ Henry F. Davenport
Director of Project Development

JA.61

Files 63-83
63-84
63-85

March 11, 1964

Mr. Walter E. Washington, Executive Director,
National Capital Housing Authority,
Washington 25, D. C.

Dear Mr. Washington:

The Zoning Commission in executive session on March 3, 1964, after public hearing held on February 28, 1964, approved the following change to the zoning map:

"All lots in square 4119, bounded by Bryant and 18th Streets and Montana Avenue, N.E. are changed from R-1-B to R-3, and all lots in squares 4109, 4110, E-4112 and W-4112, said property located within the area bounded by Bryant, 22nd, Channing and 18th Streets, N.E. are changed from R-1-B to R-5-A."

This action was taken as the result of an inspection of the property by Members of the Commission, from the evidence adduced at the public hearing held on February 28, 1964, which includes the written report of the Zoning Advisory Council, a copy of which is enclosed for your information.

Yours very truly

W. E. CHASE,
Executive Officer

Encl. 1

CC: Mr. William T. Hannan,
637 Woodward Building,
Washington 5, D. C.

NATIONAL CAPITAL HOUSING AUTHORITY
Washington 25, D. C.

July 13, 1964

Zoning Commission, D. C.
District Building
Washington, D. C. 20004

Re: DC-1-44, Montana Terrace

Gentlemen:

In accordance with Article 75, Section 7501 of the Zoning Regulations, the NCHA hereby applies for Zoning Commission approval of a large-scale planned low-rent housing development to be known as Montana Terrace, Project DC-1-44, located on Squares 4119 and 4121, bounded by Montana Avenue, 15th, 18th, Bryant and W Streets N.E. The project will consist of 155 dwelling units.

Transmitted herewith are five sets of drawings containing:

1. A site plan on which is shown the information requested under Sub-section 7501.31 (a) through (g) of the Zoning Regulations. Also on this sheet is a location map meeting the requirements of Sub-section 7501.32.
2. The remaining drawings show the information required under Sub-section 7501.71 (a) through (f).

The Authority hereby certifies that:

- (1) The area to be included within the development contains more than five acres;
- (2) The Authority is the legal owner of all rights in the entire designated area to be included within the development;
- (3) The gross floor area of all buildings does not exceed the sum of the total permitted within the designated area under the floor area ratio established by the regulations for this R-3 district;
- (4) No building exceeds the maximum height of buildings permitted in

this R-3 District in accordance with Sub-section 3201.1 of the Zoning Regulations;

- (5) No building located in the designated area exceeds on any one lot the bulk limitations established by the floor area ratio and percent of lot occupancy requirements of the R-5-D District;
- (6) Yards and courts for each residential building are of an area and dimension not less than the requirements for each such building in the R-5-D District.
- (7) Off-street parking spaces and loading berths for each residential building have been provided in an amount not less than that required for each such building in an R-5-D District.

As provided by Sub-section 7501.4 of the Zoning Regulations, we would appreciate your prompt submission of this application and the accompanying documents to the National Capital Planning Commission for their review.

Sincerely yours,

/s/Walter E. Washington
Executive Director

Enclosures

BRIEF FOR APPELLANTS

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,799

THE NATIONAL BANK OF WASHINGTON
Trustee Under Joint Venture Agreement and
Trust Dated December 27th, 1960

and

DONALD S. NASH
Individually and as Trustee Under Joint
Venture Agreement and Trust, etc.

and

ROBERT S. NASH
Individually and as Trustee Under Joint
Venture Agreement and Trust, etc.

Appellants

v.

THE ZONING COMMISSION OF THE DISTRICT OF COLUMBIA,
and its members:
Walter N. Tobriner, *et al.*

and

THE UNITED STATES OF AMERICA

and

United States Court of Appeals
for the District of Columbia Circuit
THE NATIONAL CAPITAL HOUSING AUTHORITY
and its members:
Walter N. Tobriner, *et al.*

FILED MAR 29 1965

Appellees

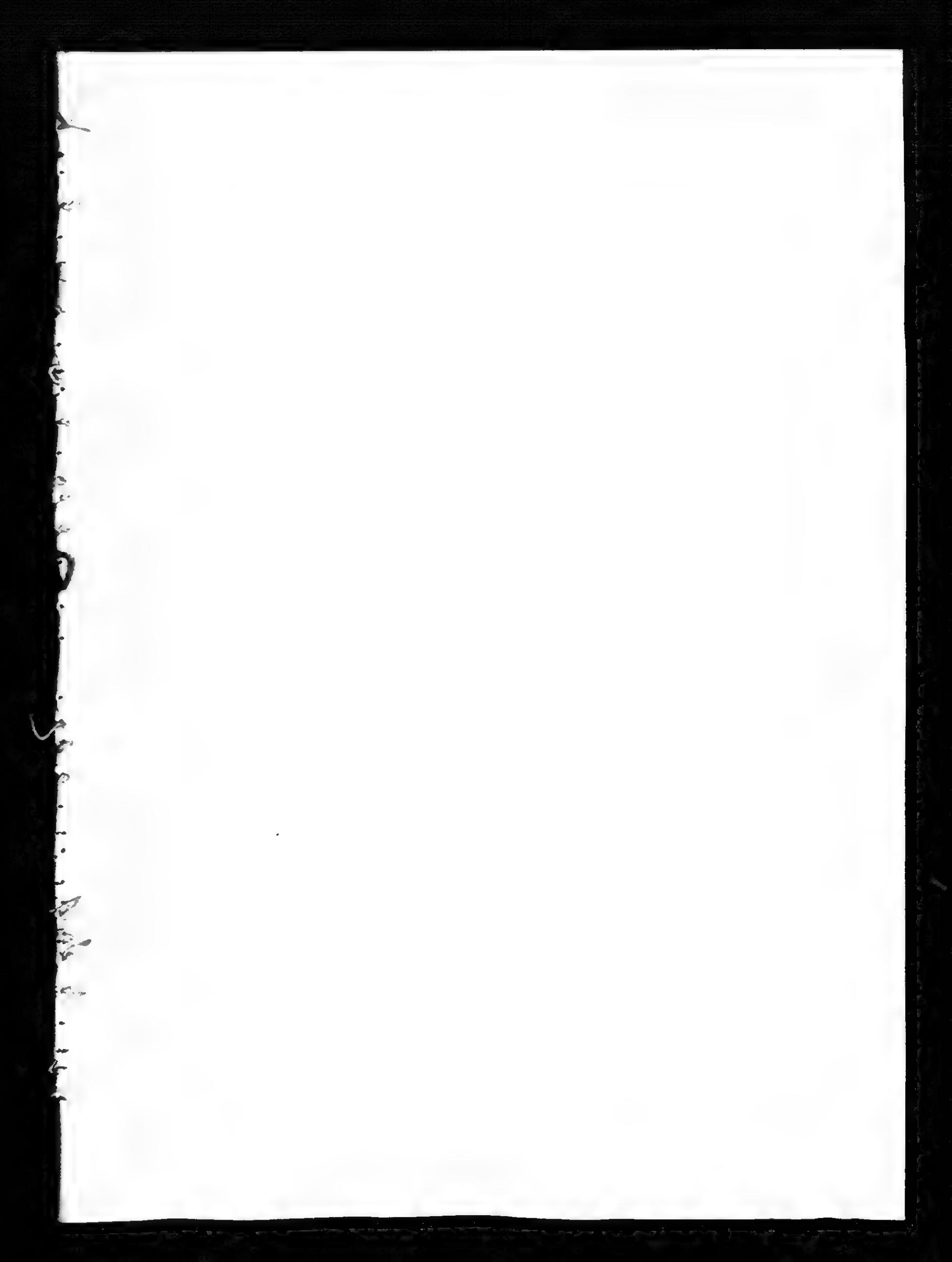
Nathan J. Paulson
CLERK
Appeal From the United States District Court
for the District of Columbia

WILLIAM T. HANNAN

637 Woodward Building
Washington, D.C.

Attorney for Petitioner

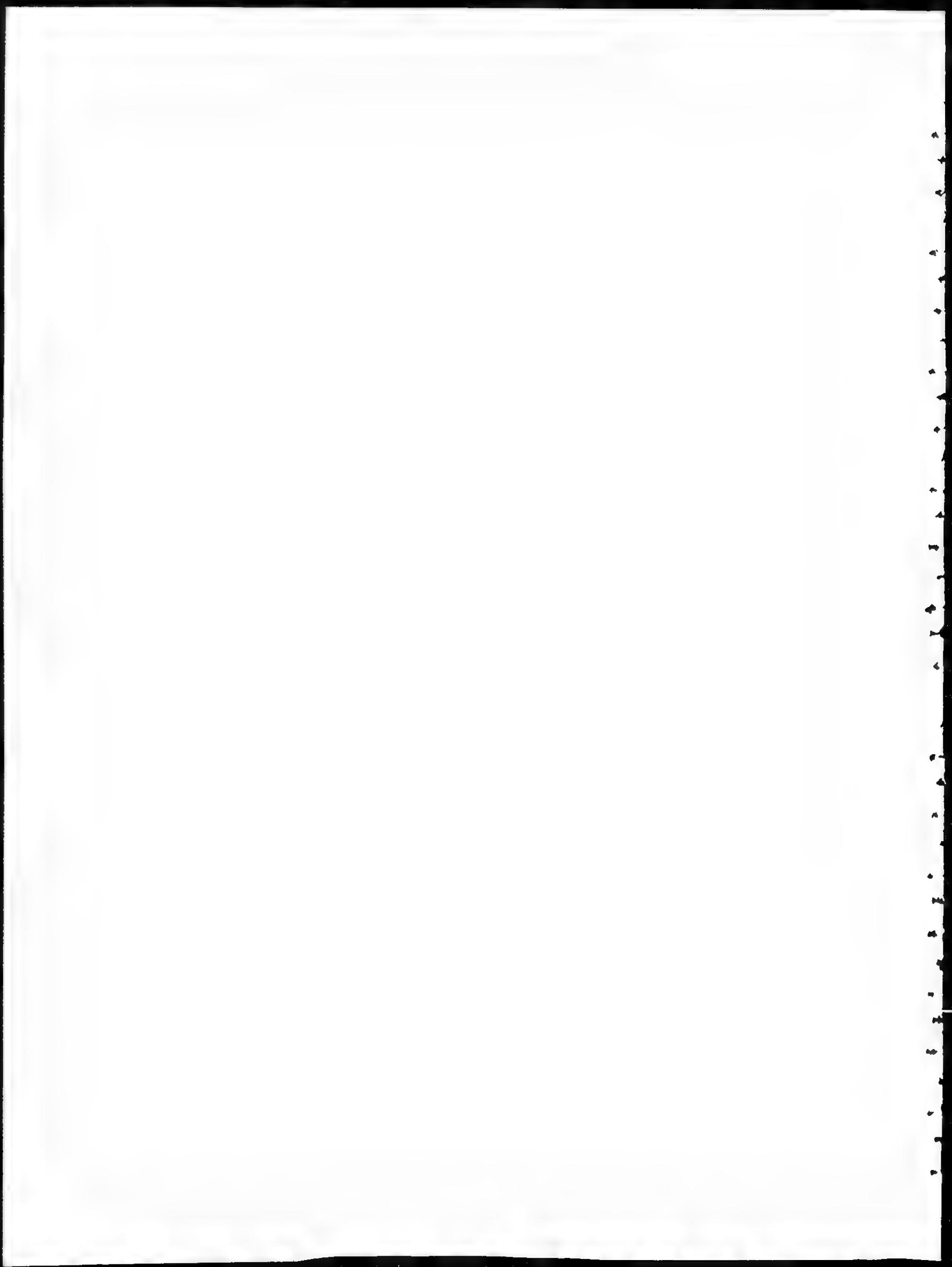
Of Counsel:
HANNAN, CASTIELLO & BERLOW



(i)

QUESTIONS PRESENTED

1. Where there is in the record substantial evidence to support property owners' allegations of (1) arbitrariness and capriciousness by the Zoning Commission, and (2) improper conduct by the members of the Zoning Commission and the National Capital Housing Authority, either or both of which resulted in property owners being denied the full use of their property, may the District Court deny property owners the right of discovery and grant summary judgment to the Authority, dismissing property owners' complaint?
2. Where it appears from substantial and uncontroverted evidence that the Zoning Commission arbitrarily and capriciously denied property owners' petition for a zoning classification allowing full use of their property, and it appears from undisputed testimony that the Zoning Commission was improperly influenced by the National Capital Housing Authority, did the District Court err in refusing to order the Zoning Commission to nullify its change of zoning and to substitute therefor that which is its indicated use?



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UNITED STATES CODE CITED

United States Code	
28 - § 1291	1
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(iv)

DISTRICT OF COLUMBIA CODE CITED

District of Columbia Code, 1961, Supp. III

§ 5-104, fn.	2
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REGULATIONS CITED

Zoning Regulations of the District of Columbia

§ 2101.11	2, 3, 4
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BRIEF FOR APPELLANTS

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,799

THE NATIONAL BANK OF WASHINGTON
Trustee Under Joint Venture Agreement and
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Individually and as Trustee Under Joint
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Appellants

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and

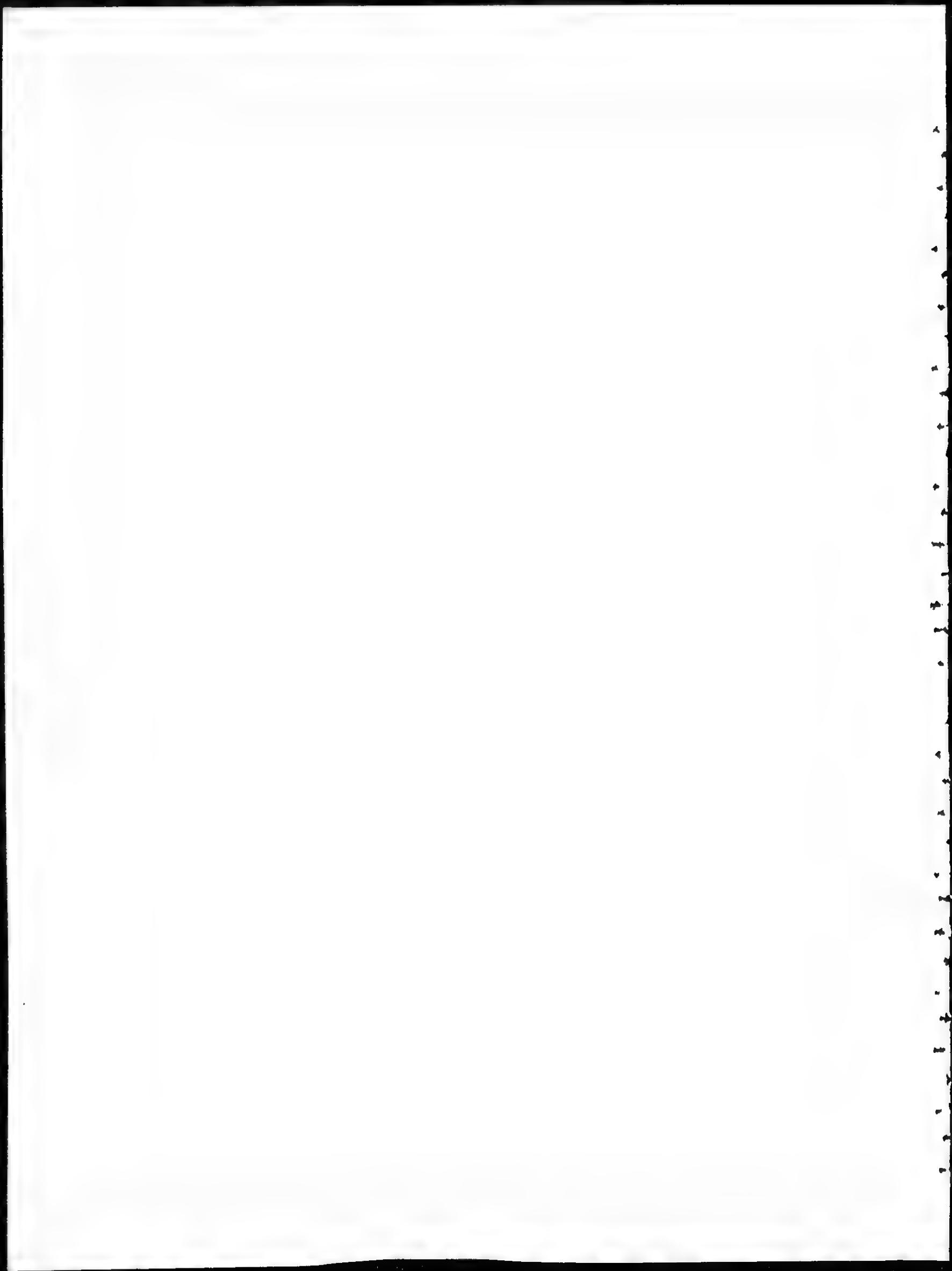
THE UNITED STATES OF AMERICA

and

THE NATIONAL CAPITAL HOUSING AUTHORITY
and its members:
Walter N. Tobriner, et al.

Appellees

*Appeal From the United States District Court
for the District of Columbia*



BRIEF FOR APPELLANTS

JURISDICTIONAL STATEMENT

This appeal is from a final judgment of the United States District Court for the District of Columbia, entered June 15, 1964, granting defendants' - appellees' motions for summary judgment, dismissing the Amended Complaint, and denying plaintiffs' - appellants' motion for preliminary injunction as moot. Notice of Appeal was filed on June 22, 1964. The jurisdiction of the District Court was invoked under D. C. Code, 1961, § 11-306. This Court has jurisdiction under 28 U.S.C., § 1291.

STATEMENT OF THE CASE**The Parties**

Appellants, Robert S. Nash, Donald S. Nash and the National Bank of Washington, are trustees under a joint venture agreement and trust dated December 27, 1960, of which trust the following squares of property, located in the District of Columbia, are a part; squares 4119, 4112, W4112 (except Lot 800); appellant, Donald S. Nash, is the owner of square E4112 and square 4110 (except Lots 801, 802, 805 and 806) all in the District of Columbia (J.A. 3).

Appellee, Zoning Commission of the District of Columbia (hereinafter the "Commission"), is composed of the Board of Commissioners of the District of Columbia (Walter N. Tobriner, President), as well as the Director of the National Park Service and the Architect of the Capitol (J.A. 1). The Zoning Commission is empowered by Congress to determine and regulate the uses of buildings and lands in zones into which it, the Zoning Commission, has divided the District of Columbia (J.A.3).

The National Capital Housing Authority (hereinafter the Authority) is a redesignation of the "Alley Dwelling Authority,"¹ of which the said Walter N. Tobriner was, at all times pertinent herein, the Chairman, and Walter E. Washington the Executive Director (J.A. 5).

The Property

The property in issue, square 4119, was located in an R-1-B zone (J.A. 30-d); R-1 zoning permits one-family detached dwellings.² The land adjacent to the south and east thereof is zoned C-M-1 (J.A. 30-d); C-M zoning permits commercial and light manufacturing uses.³ The property to the north is zoned R-1 (J.A. 30-d). Square 4119 has been owned by the Nash family since approximately 1930 (J.A. 41). In 1940, the said property was zoned residential, permitting apartment construction (J.A. 41). To the south and east of said square are located such enterprises as a lumber company, the B & O Railroad, a scrap iron yard, an electric company sub-station (J.A. 41, 42). Recently, the following enterprises have developed in the immediate vicinity: a bakery, manufacturer of electric motors, elevator company, sign company, paper company, a noodle factory, heating equipment outlet, printing company, iron works, car wash, sheet metal works, auto repair, scaffolding company, a safe and lock company (J.A. 42). Some of the foregoing businesses are located in the squares adjacent to 4119, and all of them are within two squares of subject property (J.A. 30-d).

Square 4119 itself is a more-or-less triangular-shaped lot, on grade, and bounded by Montana Avenue, Bryant Street, and 18th Street, N.E. (J.A. 30-d). It slopes downward from the intersection of Montana Avenue and Bryant Street on the northwest toward Adams Street, to the southeast (J.A. 30-d). The property is totally unimproved (J.A. 46).

¹ D.C. Code (1961 Ed.) § 5-104 fn.

² Zoning Regulations of the District of Columbia, Section 2101.11.

³ Zoning Regulations of the District of Columbia, Section 2101.14.

Charles C. Koones, a realtor (and former member of the Board of Zoning Adjustment) characterized the neighborhood to the immediate south of the property as rapidly becoming devoted to light industrial uses, resulting in a general deterioration of the single family dwelling uses on the perimeter of the light industrial area (J.A. 40).

Proceedings Before the Zoning Commission

By letter dated December 3, 1963 (J.A. 36, 36), the Authority applied to the Commission for a change of zoning of appellants' property, square 4119, from R-1-B (single family detached) to R-3 (single family row houses).⁴ The letter of application contained the following concluding sentence:

"Although Paragraph 9101.22 of the Zoning Regulations specifically gives the Authority the right to propose a zoning amendment without requiring it to be the owner, we request that if the property is rezoned, the effective date of the rezoning action be made subsequent to the Authority's acquisition of title to the property."

On December 31, 1963, appellants, unaware of the Authority's application upon appellants' own property, having received no notice thereof, applied for rezoning of square 4119 from R-1-B to C-M-1 and, in a separate application requested similar rezoning of W4112, 4112, E4112, 4110 and 4109 (J.A. 37, 38). Both of appellants' applications were fully supported by plats and affidavits, including the aforementioned affidavit of Charles C. Koones (J.A. 39, 40, 41).

On January 23, 1964, the Commission notified appellants of a public hearing to consider a "proposal to change from R-1-B to R-5-A all lots in squares 4109, 4110, E4112, 4112, W4112 and 4119 or in the alternative change from R-1-B to R-3 all of the above mentioned lots . . ." (J.A. 43).

⁴ Zoning Regulations for the District of Columbia, Section 2101.11.

Upon inquiry at the Commission, appellants were advised for the first time that the Commission had rejected appellants' applications and would, instead, hear the Authority's application (J.A. 6). This fact was confirmed by the Commission's letter stating that reasons would be forwarded at a later date (J.A. 44).

On February 28, 1964, the Commission held the public hearing referred to above, in accordance with its notice to appellants (J.A. 43). In addition to hearing testimony, the Commission heard the mandatory report of the Zoning Advisory Council which recommended a rezoning of all squares, including 4119, from R-1-B to R-5-A⁵ (subject to reconsideration of a C-M-1 zoning of a portion of 4109 at a future date) (J.A. 47).

On March 3, 1964, the Commission approved R-3 zoning for 4119 only, and R-5-A zoning for all other squares considered in the applications and proposals involved (J.A. 61).

Proceedings Before the District Court

Appellants, on February 14, 1964, filed in the United States District Court for the District of Columbia, a Complaint alleging that the Commission's denial of appellants' applications was not based upon the record, did not reflect its independent judgment, and was the result of improper pressure exerted upon its members by persons in the Executive Branch of the United States government (J.A. 7). Further, it alleged irreparable injury, denial of due process, arbitrariness, capriciousness and abuse of discretion (J.A. 8). It prayed, *inter alia*, that the Commission's denial of appellants' application be declared void, for an injunction (1) directing the Commission to set aside its denial of appellants' applications and to amend the zoning map to reflect a change of zoning of the subject squares to C-M-1; (2) prohibi-

⁵ Zoning Regulations of the District of Columbia, Section 2101.11.

ting the Authority from taking further steps toward acquisition of title, and (3) prohibiting the Commission from hearing its own proposal or that of the Authority (J.A. 8). On February 19, appellants filed a motion for a preliminary injunction, seeking to preserve the zoning status of the property pending final hearing (J.A. 9). Appellees filed separate motions to dismiss (J.A. 23, 28).

Then, on February 28, appellants filed a Notice of the Taking of the Depositions of William R. Simpson, Jr., General Counsel for the Authority, Joseph W. Hoban, Jr., Deputy Director, Project Development, and Walter E. Washington, Executive Director of the Authority (J.A. 11).

The Authority moved to quash the notice and subpoenas (J.A. 14). Upon hearing it was agreed that the notices would be withdrawn because they were filed before the expiration of twenty days after filing of the Complaint without leave of court.⁶

On March 9, 1964, upon expiration of the statutory twenty-day period, similar notices of discovery proceedings were filed by appellants (J.A. 13). Again appellees moved to quash, on grounds similar to those urged in their original motion (J.A. 14). There followed a number of hearings on the motions to quash, to dismiss and for summary judgment (J.A. 23, 28, 31). The substance of the various motions was (1) that the court had no jurisdiction over the Commission, it being a legislative body, and thus, could grant no relief; (2) that the Authority could not be sued without the consent of the United States, and (3) notice of discovery should be quashed because the Complaint failed to state a cause of action.

At the conclusion of the aforesaid series of hearings, the court denied the appellants the opportunity of discovery, quashing all notices of taking of depositions (J.A. 33, 34). The stated purpose of the deposi-

⁶ 28 U.S.C. Rule 26(a).

tions was to cause evidence bearing on the facts in issue to be produced (J.A. 23). On June 15, 1964 the court granted summary judgment on the ground that appellants' allegations were deficient in facts constituting a cause of action (J.A. 34, 35), and dismissed appellants' complaint.

REGULATIONS INVOLVED

Zoning Regulations of the District of Columbia

Section 2101-Number of Districts

2101.1 For the purpose of these regulations the District of Columbia is hereby divided into the following *districts*:

2101.11 Residence Districts:

R-1 One-family detached dwellings, subdivided into:

R-1-A Low density

R-1-B High density

R-2 One-family semi-detached dwellings

R-3 Row Dwellings

R-4 Row Dwellings, conversions, and apartments

R-5 General residence, subdivided into:

R-5-A Low density

R-5-B Medium density

R-5-C Medium-high density

R-5-D High density

* * *

Section 7501-Site Plans for Large-Scale Planned Developments

7501.1 The purpose of this Section is to encourage in one or more Districts irrespective of use restrictions required by general zoning regulations the design of well planned large-scale residential, institutional, or commercial developments, or a

combination thereof which might offer a variety of building types or more attractive and efficient over-all planning and design without sacrificing creative and imaginative planning. Under this Section designed shopping centers, large-scale residential developments, and other types of uses might be developed with greater flexibility than otherwise would be possible under these regulations in areas which are located in one or more Residence, Special Purpose, or Commercial Districts. The procedure and standards established herein are intended to permit, with Zoning Commission approval, diversification in the use, size, type, and location of *structures*, and to improve circulation and other site facilities while at the same time ensuring adequate standards relating to public health, safety, welfare, and convenience in the use and occupancy of *buildings* and other facilities in planned building groups.

7501.2 When an application is filed . . . shall certify that:

7501.21 The area to be included within the development contains five or more acres
(*Italics in original*)

STATEMENT OF POINTS

1. The District Court erred in refusing to permit appellants to take depositions.
2. The District Court erred in granting summary judgment for appellees.
3. The District Court erred in dismissing appellants' Amended Complaint.

SUMMARY OF THE ARGUMENT

There is, in the record, substantial evidence to support appellants' allegations (1) that appellants' property was arbitrarily under-zoned by the zoning Commission; (2) that such under-zoning was effected not as

a result of the impartial and independent judgment of the Commission based upon facts fairly presented, but, rather, as the result of either (a) a conscious effort by the Authority to improperly influence the Commission and to impair its independence of judgment, and/or, (b) a conscious effort on the part of the Commission to abandon generally accepted zoning principles. The District Court erred, therefore, in failing to nullify the decision of the Commission in refusing to allow appellants to avail themselves of discovery proceedings, in granting appellees' motions for summary judgment and in dismissing appellants' complaint for injunctive relief.

ARGUMENT

I.

The Court Erred by Ignoring the Proved Effect of the Improper Influencing by the Housing Authority Upon the Zoning Commission and Preventing Discovery in Support of the Allegations of the Complaint.

Generally speaking the correctness or incorrectness of the decision of the Commission is not one for judicial review if there is substantial evidence to support it and the parties have been accorded due process of law. *Jarrott v. Scrivener*, 225 F. Supp. 827 (1964). To this must be added equal protection of the law. Under the pertinent provisions of the District of Columbia Code, the Commission is not required to consider a petition for rezoning; however, equal protection of the laws demands that where the Commission determines that it will consider a petition for rezoning of a particular parcel, it cannot reject the petition of the property owner in favor of that of a stranger to title.

Having decided to examine the zoning of 4119, the Commission could not, under the safeguard of equal protection of the law, admit

the petition of the Authority and deny the petition of the owners-appellants. The force and effect of the last paragraph of the Authority's letter becomes most apparent in this consideration.

As stated by Judge Pine in his recent decision in a similar case of alleged influence before such a body,

"Ordinarily, a review by the Court of the decision of the Board would be limited to the Board's record of proceedings before it, and the Court would not be permitted to hear evidence *de hors* that record. But in this case, where the integrity of the Board's decision is questioned, the Court may go outside the Board's record and receive independent evidence, as was done in this case. That the Court may do so is conceded by defendants." *Jarrott v. Scrivener, supra*, at p. 829.

That the court should have done so is urged by appellants.

With the exception of the last paragraph thereof, the Authority's letter dated December 3, 1963, addressed to the Zoning Commission, is nothing more than an application for rezoning.

The final paragraph, however, is a shocking example of overreaching. It was dictated solely by the Authority's desire to acquire property from its owners at less than fair market value. When read in context, it is difficult to escape the conclusion that the Authority expected the Commission to seriously consider its unusual request. The Executive Director signed the letter which was written on Authority letterhead. It was an application for rezoning, and important to the Authority. Yet the record does not disclose any effort on the part of the Commission or the Authority to expunge the record of this gross impropriety until the public hearing on February 28, 1964, at which time the Executive Director of the Authority declared to the Commission that "we find that this request is not applicable under this provision." This statement followed by more than one month the filing of appellants' Complaint charging improper conduct. (J.A. 50)

The seeming indifference of both appellees, both to the letter and to the charges of impropriety give rise to grave doubts. The dual membership of Walter N. Tobriner in both the Zoning Commission and the Authority create a situation which could easily result in "pressure" direct or indirect, conscious or unconscious, being exerted by one upon the other.

Following the improper application of the Authority, and before the rezoning hearing, appellants filed their Complaint asking that the Commission be enjoined from proceeding upon the Authority's petition for rezoning as against the appellants'-owners' petition.

Upon the Commission's hearing, that which appellants had urged would occur came to pass - i.e., the confiscatory and unequal zoning of appellants' property. The letter and the influences surrounding it had had their effect.

At this point, to buttress its contentions, appellants sought discovery of the officials responsible for the letter and the improprieties which it signified. *Union Savings Bank, Patchogue, et al. v. Saxon*, 209 F. Supp. 319 (1962); *Jarrott v. Scrivener, supra*.

Now the Court had before it the allegation of improprieties and the visible effect of those improprieties - i.e., the unequal treatment accorded to appellants. At this stage the Court should not have had to be urged to permit discovery and enlargement of the facts before it; instead, the Court quashed the notice of discovery and, ignoring the allegations of the Complaint, granted summary judgment for the defendants.

II.

The Action of the Zoning Commission in Rezoning Square 4119 From R-1-B to R-3 Was Clearly Arbitrary and Capricious, Having No Basis Other Than to Permit the Authority to Acquire 4119 at Less Than Fair Market Value.

Appellants' Complaint requested the court to declare the Zoning Commission's denial of appellants' application to be illegal, void and of no force and effect, and to direct the Commission to rezone the property in accordance with its indicated use.

The action of the Commission in denying appellants' application and granting the application of the Authority was arbitrary beyond debate for the reasons set forth below:

The Commission had before it three applications: (1) appellants' (owners') application for rezoning of square 4119 from R-1-B to C-M-1; (2) appellants' (owners') application for rezoning of 4110, E4112, 4112 and W4112 (and 4109, not owned by appellants, but included for uniformity of zoning) from R-1-B to C-M-1; (3) the application of the Authority for change of zoning of 4119 only, from R-1-B to R-3. Appellants' applications were supported by an affidavit of a former member of the Board of Zoning Adjustment stating that, ". . . the highest and best economic use to which said property can be devoted is light industrial . . ." The Authority's application was supported by a letter to the Zoning Commission and an architect's site plan, showing an arrangement of apartments on the square in question, as envisioned by the Authority.

Appellants' applications were summarily denied without hearing. The application of the Authority, concerning 4119 only, was set down for hearing on February 28, 1964, as well as the Commission's own proposal to change the zoning of 4110, W4112, 4112, E4112 and 4109 (appellants' remaining squares, except for 4109) from R-1-B to R-5-A or in the alternative, to R-3.

The report by the Zoning Advisory Council prior to the February 28 hearing recommended that all of the squares involved be changed to R-5-A. The Commission accepted the recommendation of the Council as to all squares but one, appellants' square 4119, which the Commission rezoned R-3 in accordance with the Authority's request.

As reasons for the rezoning the Commission stated that its action was the result of an inspection of the property by its members, the evidence adduced at the public hearing, and the written report of the Zoning Advisory Council. Having noted previously the ignoring by the Commission of the mandatory report of the Zoning Advisory Council with regard to 4119, we proceed to the evidence adduced at the hearing:

The Washington Board of Realtors recommended a change to R-3 or R-5-A for *all* squares involved, making no distinction between them.

Mr. Norman Glasgow, appearing as counsel for the National Lutheran Home, testified that under Article 75, Zoning Regulations, the Authority was seeking to devote 4119 to an R-5-A use, although seeking an R-3, resulting in inequity to the property owner (J.A. 53-57).

There followed a succession of representatives of local property owners, speaking against any change of zoning for the squares involved. Not one of the witnesses differentiated any one square from another on any basis.

Representing the Authority, Executive Director Walter E. Washington presented testimony which established (1) that 4119 had been included in the Authority's Project Site Plan (although it was the only such square on the east side of Montana Avenue, N.E.) and (2) that housing was urgently needed. No statistics were presented regarding availability and relative cost of other properties.

In short, there is no evidence of record to indicate that 4119 is geographically, topographically, or in any other wise, more suited to R-3 zoning than that accorded the other squares involved.

Obviously disturbed by the results of its own observation, the Commission requested supplemental staff observations by the Authority on the suggested change of zoning of 4119 to R-5-A rather than R-3. The Authority replied (J.A. 59, 60), submitting three reasons which, because of their importance on the issue of arbitrariness, will be paraphrased: (1) that planning studies on the basis of R-5-A had not been developed by the Authority and that, therefore, it was unable to assess the results of R-5-A on the feasibility of the development of the total project; (2) R-5-A zoning would result in an *increase in cost to the Authority*, necessitating a higher density development *to which the Public Housing Administration might raise an objection*; (3) such an increase in density would require a revised Development Program which would delay the development of the project.

Otherwise stated, the Authority's supplemental staff observations sought to avoid a change of zoning of 4119 from R-1-B to R-5-A on the grounds that (1) it had not made a comprehensive study of the area; (2) it did not want to pay the owners what the property was worth because the whole project might be turned down; and (3) it did not want to delay the project.

There is nothing in the record to reflect the opinion of the Commission resulting from its inspection of 4119 or any other parcel involved.

There was, in fact, only one thing that distinguished 4119 from the other squares sought to be rezoned; it was the only square within the Authority's Project Area Plan which was situated on the opposite side of Montana Avenue from the rest of the project area. Such an artificial distinction affords no basis for the Commission's failure to rezone 4119 at least in conformity with its rezoning of the other squares.

The Commission, in effect, shifted to appellants the burden of providing low-cost housing by underzoning and providing an opportunity to take at less than fair market value.

The Authority is admittedly proceeding in its plan under Article 75 of the Zoning Regulations, and the Site Plan discloses that it will devote 4119 to an R-5-A use, even though zoned and acquired at R-3 (J.A. 62).

Nowhere does the record disclose the reason for zoning appellants' property R-3 instead of R-5-A, except to permit its acquisition by the Authority at a low price in accordance with its request. A review of the administrative record reflects that the Authority has been accorded the utmost partiality by the Commission, and that the property owners' rights have been all but completely ignored.

The action of zoning authorities, as of other administrative officers, is not to be declared unconstitutional unless the court is convinced that it is "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare." *Village of Euclid v. Ambler Realty Company*, 272 U.S. 365, 395, 47 S. Ct. 114, 121, 71 L.Ed. 303, 54 A.L.R. 1016 (1926); *Nectow v. City of Cambridge*, 227 U.S. 183, 48 S. Ct. 447, 72 L.Ed. 842 (1928); *Prentiss v. American University, et al.*, 94 U.S. App. D.C. 204, 214 F.2d 282 (1954).

If appellants were denied a fair and impartial hearing before the Zoning Commission, they are entitled to relief. *Jarrott v. Scrivener, supra*; *Donovan v. Clarke*, 223 F. Supp. 795 (1963).

CONCLUSION

For the foregoing reasons, this court should vacate the order of the District Court granting summary judgment against appellants and dismissing their complaint, and either remand the case with direction for the court to take evidence in the cause, or, upon the record, direct the District Court to enter its order directing the Zoning Commission to amend the zoning map so as to accord R-5-A zoning to square 4119 as it had to the other similarly situated squares under its consideration.

Respectfully submitted,

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BRIEF FOR APPELLEES THE ZONING COMMISSION OF
THE DISTRICT OF COLUMBIA AND ITS MEMBERS

UNITED STATES COURT OF APPEALS
For The District Of Columbia Circuit

No. 18, 799

THE NATIONAL BANK OF WASHINGTON, et al.,

Appellants,

v.

THE ZONING COMMISSION OF THE DISTRICT
OF COLUMBIA and its members

and

UNITED STATES OF AMERICA

and

NATIONAL CAPITAL HOUSING AUTHORITY,

Walter N. Tobriner, Chairman,

Walter E. Washington, Executive Director,

Appellees.

Appeal From The United States District Court
For The District Of Columbia

United States Court of Appeals
for the District of Columbia Circuit

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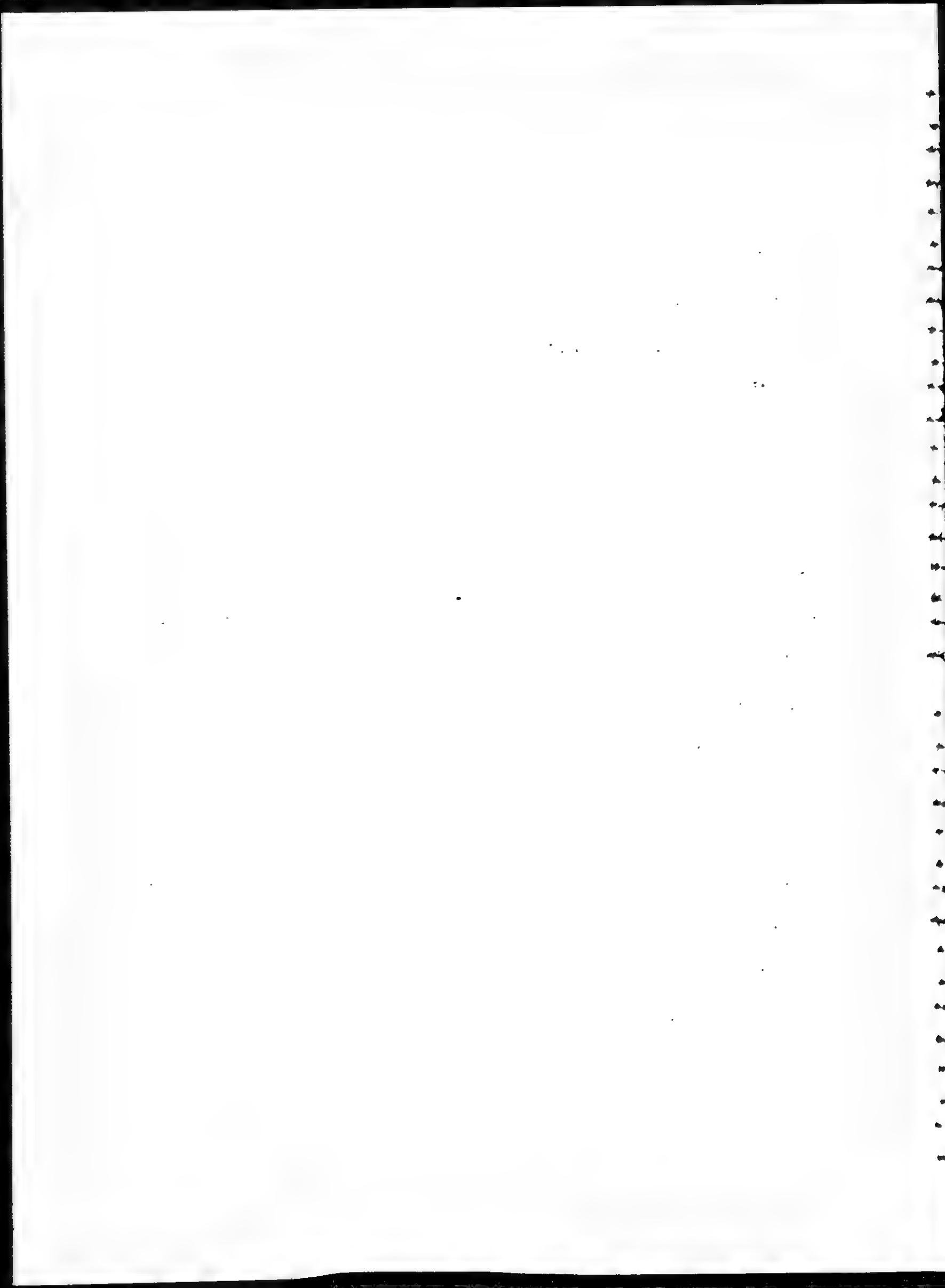
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QUESTIONS PRESENTED

In the opinion of the appellees, who are the members of the Zoning Commission of the District of Columbia, the questions presented are:

1. Did not appellants' failure to file, pursuant to the District Court's Rule 9 (h), " * * * a concise 'statement of genuine issues' setting forth all material facts as to which it is contended there exists a genuine issue necessary to be litigated" warrant the District Court in concluding, as it did, that the facts, set forth in the statement of material facts, as to which the members of the Zoning Commission contended there was no genuine issue, existed without controversy, and that there were no other material facts as to which there existed a genuine issue necessary to be litigated?
2. Where appellants were fully informed of proposals to rezone their property from R-1-B to R-3 or R-5-A, but affirmatively declined to appear at the public hearing called by the Zoning Commission to consider such proposals, and the Commission, on the basis of substantial evidence, rezoned the property R-3, did not the court below properly refuse to substitute its judgment for that of the Zoning Commission?



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* <u>Leventhal v. District of Columbia,</u> <u>69 App. D. C. 229, 100 F. 2d 94 (1938)</u>	14
* <u>Lewis v. District of Columbia,</u> <u>89 U. S. App. D. C. 72, 190 F. 2d 25 (1951)</u>	14
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REGULATIONS CITED

Zoning Regulations of the District of Columbia,	
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* Cases and authority chiefly relied upon are marked by asterisks.

UNITED STATES COURT OF APPEALS
For The District Of Columbia Circuit

No. 18,799

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Appellants,

v.

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and

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and

NATIONAL CAPITAL HOUSING AUTHORITY,

Walter N. Tobriner, Chairman,

Walter E. Washington, Executive Director,

Appellees.

Appeal From The United States District Court
For The District Of Columbia

BRIEF FOR APPELLEES THE ZONING COMMISSION OF
THE DISTRICT OF COLUMBIA AND ITS MEMBERS

COUNTER-STATEMENT OF THE CASE

This case arises as a result of action by the Zoning Commission of the District of Columbia on applications to rezone two areas in the northeast section of the city. The first area (square 4119) is triangular, and is bounded on the north by Bryant Street,

on the east by 18th Street and on the southwest by Montana Avenue. The second area (squares 4109, 4110, E-4112, 4112 and W-4112) is rectangular, and is bounded on the north by Channing Street, on the east by 22nd Street, on the south by Bryant Street and on the west by 18th Street (J. A. 30-d). Appellants (as trustees or individually) are the owners of all the property in the first area (square 4119) and of most of the property in the second area (J. A. 16-17).

On December 3, 1963, appellee National Capital Housing Authority applied to the Zoning Commission for a change in zoning of the first area from R-1-B (one-family detached dwellings - high density) to R-3 (one-family row dwellings) (J. A. 36-37). During the pendency of this application, the Zoning Commission, on January 15, 1964, denied, without a hearing, appellants' applications to rezone both areas from R-1-B to C-M-1 (commercial - light manufacturing - low height) (J. A. 44-45).

Following a public hearing on February 28, 1964, on a proposal to rezone both areas either R-3 or R-5-A, the Zoning Commission, on March 3, 1964, rezoned the first area (square 4119) from R-1-B to R-3 (one-family row dwellings) and rezoned

the second area from R-1-B to R-5-A (general residence - low height and density) (J. A. 30-g - 30-h, 61).

By an amended complaint filed in the court below on March 30, 1964, appellants sought a declaratory judgment that the rezoning of the areas was illegal and a mandatory injunction directing the Zoning Commission (1) to set aside its orders denying their applications and granting the Authority's application and (2) to rezone both areas C-M-1 (J. A. 16-21).

In their amended complaint, appellants alleged that the denials of their applications and the granting of the Housing Authority's application were contrary to law because (1) they were not afforded a hearing prior to the denials of their applications, and (2) the action of the Zoning Commission did " * * * not represent the independent judgment of the Commission based upon the record and the applicable regulations * * * " but was " * * * the result of improper pressure exerted upon the members of said Commission by person or persons in the Executive Branch of the United States Government, to wit, The National Capital Housing Authority * * *" which had " * * * secretly and otherwise improperly influenced and impressed * * *" the Commission (J. A. 16-21).

In support of the allegations of improper influence, appellants relied (1) upon the Authority's application which contained a request (later withdrawn and never acted upon by the Commission) " * * * that if the property is rezoned, the effective date of the rezoning action be made subsequent to the authority's acquisition of title to the property,"¹ and (2) upon the fact that Walter N. Tobriner, as President of the Board of Commissioners of the District of Columbia, was a member of both the Zoning Commission and the National Capital Housing Authority² (J.A. 16-21, 50-51).

On April 6, 1964, the members of the Zoning Commission filed a motion to dismiss or, in the alternative, for summary judgment on the amended complaint, together with six exhibits constituting the entire record of the administrative proceedings in connection with the Commission's consideration of the applications of appellants and of the Housing Authority for rezoning of the areas (J.A. 23, 30-a).

¹ Upon application of the Authority, the Commissioners of the District of Columbia, on December 6, 1962, and the National Capital Planning Commission, on September 13, 1963, had approved the first area (square 4119) as a site for low rent public housing (J. A. 51). See D. C. Code, 1961, § 5-104.

² When the Zoning Commission, on January 15, 1964, voted to deny appellants' applications and on March 3, 1964, voted to rezone the areas, Mr. Tobriner abstained (J. A. 30-g - 30-h).

Pursuant to the District Court's Rule 9 (h), the members of the Commission filed also a detailed statement of the material facts as to which they contended there was no genuine issue (J. A. 24-27). Appellants did not, as permitted by said rule, " * * * file a concise 'statement of genuine issues' setting forth all material facts as to which it is contended there exists a genuine issue necessary to be litigated."

By order entered June 15, 1964, the District Court granted the motion of the members of the Commission for summary judgment and dismissed the complaint as to them³ (J. A. 34). This appeal followed.

SUMMARY OF THE ARGUMENT

Since, by failing to file, pursuant to the District Court's Rule 9 (h) a "statement of genuine issues," appellants have admitted that there exists no genuine issue as to any material fact, they are clearly not entitled to a reversal and remand " * * * with direction for the court to take evidence in the cause * * *."

³ On the same date, the court also granted the motion of the other defendants for summary judgment and dismissed the complaint as to them (J. A. 35).

On the issue of whether, upon the record, the members of the Zoning Commission were entitled to judgment as a matter of law, appellants have completely changed their position from that taken below. The R-5-A zoning which appellants now, and for the first time, contend should have been accorded square 4119, was never sought from the Zoning Commission, nor did appellants, by their complaint in the District Court, seek to have the Commission ordered to accord R-5-A zoning to square 4119.

Because the decision of the Zoning Commission to rezone square 4119 as R-3, rather than R-5-A, is fully supported by substantial evidence in the record or is, at the very least, "fairly debatable," the court below was not permitted to substitute its judgment for that of the Commission.

Square 4119 is now in the process of being condemned by the National Capital Housing Authority. Its R-3 zoning, therefore, bears on appellants' rights only to the extent, if any, that such zoning may conceivably affect the compensation paid for the property. Since appellants did not allege that they would receive a higher compensation for their property under R-5-A zoning than they will receive under R-3 zoning, they were clearly not entitled to the injunctive relief they sought.

ARGUMENT

The court below did not err in granting
the motion of the members of the
Zoning Commission for summary
judgment.

In the concluding paragraph of their brief, appellants ask this Court to " * * * vacate the order of the District Court granting summary judgment against appellants and dismissing their complaint, and either [1] remand the case with direction for the court to take evidence in the cause, or, [2] upon the record, direct the District Court to enter its order directing the Zoning Commission to amend the zoning map so as to accord R-5-A zoning to square 4119 as it had to the other similarly situated squares under its consideration."

This Court would be justified in reversing and remanding " * * * with direction for the court to take evidence in the cause * * *" only upon a showing that there exists a " * * * genuine issue as to any material fact * * *. " Rule 56 (c), F. R. C. P.

Rule 9 (h) of the Rules of the court below provides:

"MOTIONS FOR SUMMARY JUDGMENT.
In addition to the points and authorities required by subparagraph (b) of this Rule there shall be served and filed with each motion for summary judgment pursuant to Rule 56 of the Federal Rules of Civil

Procedure a statement of the material facts as to which the moving party contends there is no genuine issue.

"Any party opposing the motion may, not later than three days prior to the hearing, serve and file a concise 'statement of genuine issues' setting forth all material facts as to which it is contended there exists a genuine issue necessary to be litigated.

"In determining any motion for summary judgment, the Court may assume that the facts as claimed by the moving party are admitted to exist without controversy except as and to the extent that such facts are asserted to be actually in good faith controverted in a statement filed in opposition to the motion."

As required by such rule, the members of the Commission filed with their motion for summary judgment a detailed statement of the material facts as to which they contended there was no genuine issue. The failure of appellants to file, pursuant to Rule 9 (h), a "statement of genuine issues," was a clear admission by them that the facts set forth in the statement of the members of the Commission existed without controversy and that there were no other material facts as to which there existed a genuine issue necessary to be litigated. Under the circumstances, to * remand the case with**

direction to the court to take evidence in the cause *** could serve no useful purpose.

There remains only the question of whether, upon the record, appellants are entitled to the alternative relief they seek from this Court, that is, a reversal and remand of the case to the District Court with directions to order *** the Zoning Commission to amend the zoning map so as to accord R-5-A zoning to square 4119 as it had to the other similarly situated squares under its consideration."

In this connection, it should be noted that appellants have completely changed their position from that taken below. In their applications to the Zoning Commission, and by their complaint in the District Court, appellants made it to appear that they sought C-M-1 zoning for both areas. They have now abandoned all contentions respecting the zoning of the second area (squares 4109, 4110, E-4112, 4112, and W-4112) and all contentions respecting commercial zoning for the first area (square 4119). Their present position is that, upon the record, the Zoning Commission should have accorded the same R-5-A zoning to the first area (square 4119) *** as it had to the other similarly situated squares under its consideration," i.e., the second area.

The public hearing before the Zoning Commission on February 28, 1964, was upon a " * * * proposal to change from R-1-B to R-5-A all lots in squares 4109, 4110, E-4112, 4112, W-4112 and 4119 or in the alternative change from R-1-B to R-3 all of the above mentioned lots * * *" (J. A. 18, 43). By letter of January 23, 1964, appellants were notified of the time and place of the hearing on this proposal (J. A. 43). On January 30, 1964, appellants were fully informed of the contents of the application of the National Capital Housing Authority to rezone square 4119 from R-1-B to R-3 (J. A. 18). Appellants were also aware at this time that Walter N. Tobriner, as President of the Board of Commissioners of the District of Columbia, was a member of both the Zoning Commission and the National Capital Housing Authority (J. A. 18).

Notwithstanding this knowledge, neither appellants nor their counsel deigned to appear before the Zoning Commission at the public hearing on February 28, 1964, and present their views and any evidence they may have had respecting the alleged improper influence brought to bear on the Commission, or respecting the proposal to rezone the areas either R-5-A or R-3. Having deliberately and intentionally failed to avail themselves of this

opportunity, appellants should not now be heard to complain that the Commission acted illegally in rezoning square 4119 as R-3 rather than R-5-A.

There is in the administrative record ample evidence to support the Zoning Commission's action in rezoning square 4119 as R-3. Square 4119, on its longest side, abuts Montana Avenue, and the property immediately across Montana Avenue from square 4119 has long been zoned R-3 and is owned by the National Capital Housing Authority (J. A. 30-d, 51).

The report of the Zoning Advisory Counsel, received by the Commission at the hearing on February 28, 1964, recommended that " * * * the zoning of all the squares involved be changed to R-5-A subject to consideration of a C-M-1 change of a portion of square 4109 at some future date" (J. A. 45-47). The report of the Citizens Zoning Advisory Committee recommended that square 4119 be rezoned from R-1-B to R-3 and the remaining squares from R-1-B to R-5-A, with commercial zoning for the southerly portion of square 4109 to be considered at a later date (J. A. 47-48).

Thomas M. Walsh, President of the Washington Board of Realtors, supported, on behalf of the Board and its more than

1,100 members operating in the District of Columbia, the proposal to change the zoning of both areas from R-1-B to either R-5-A or R-3 and noted that "[i]t would appear the R-3 classification for row houses might be more in conformity with the surrounding areas than R-5-A would, for low density apartments" (J. A. 49).

Walter E. Washington, Executive Director of the National Capital Housing Authority, Henry F. Davenport, Director of Project Development, National Capital Housing Authority, and Louis Fry, an architect for the National Capital Housing Authority, all appeared and testified in support of their request for a change in zoning of square 4119 from R-1-B to R-3 (J. A. 50-52, 59-60).

Norman Glasgow, an attorney, appeared on behalf of the National Lutheran Home, the owner of lot 800 in square W-4112, and testified that the then R-5-B zoning of the areas was inappropriate and should be changed; that he did not oppose the application of the National Capital Housing Authority to rezone square 4119 as R-3; and that if square 4119 is rezoned R-3, the remaining squares should be rezoned R-5-A. In support of his request that, if square 4119 is rezoned R-3, the remaining squares should be rezoned R-5-A, Mr. Glasgow pointed out that the Authority, by proceeding under Article 75 of the Zoning Regulations, could

develop square 4119 for multi-family dwellings in substantially the same manner as if square 4119 were zoned R-5-A and that " * * * if the remaining land that is involved in this application were to be zoned R-3 those property owners would not be able to put their land to the same use. They would be restricted to row houses, semi-detached houses or single family dwellings. So that the only way the adjoining property owners can get the same type of multi-family use that would be developed or available to the National Capital Housing Authority would be to rezone the remaining land R-5-A * * *" (J. A. 52-57).

A representative of the Woodbridge Civic Association (with a membership of 1,025) appeared and opposed any change from the then R-1-B zoning primarily on the ground that it " * * * would bring about further overcrowding of public school facilities" (J. A. 57-58). A number of individual residents and property owners in the neighborhood also opposed the proposal before the Commission on substantially the same ground (J. A. 58). Two representatives of the Brookland Civil Association (with a membership of 920) appeared and opposed the proposal to rezone the areas R-5-A, but not the alternative proposal to rezone the areas R-3, on the ground that R-5-A zoning would further overcrowd the schools and playgrounds, would bring

about further " * * * racial changes in the neighborhood * * *" and would " * * * only hasten the time when the area would become blighted" (J. A. 58-59).

Before acting on the proposal, the members of the Zoning Commission personally viewed the areas and the surrounding neighborhood. They also had before them and considered the plats, reports and other written material submitted by both those in favor of and by those in opposition to the proposal.

It is apparent from the foregoing that, at the very least, the question whether square 4119 should have been rezoned R-3 or R-5-A was "fairly debatable." In such circumstances the court cannot substitute its judgment for that of the Zoning Commission.

Village of Euclid v. Ambler Realty Co., 272 U. S. 365, 47 S. Ct. 114, 71 L. Ed. 303, 54 A. L. R. 1016 (1926); Lewis v. District of Columbia, 89 U. S. App. D. C. 72, 190 F. 2d 25 (1951); Wolpe v. Poretsky, 79 U. S. App. D. C. 141, 144 F. 2d 505 (1944); Leventhal v. District of Columbia, 69 App. D. C. 229, 100 F. 2d 94 (1938).

This, of course, is aside from the fact, previously mentioned, that appellants, although fully informed in respect thereto, expressly

declined to appear before the Zoning Commission at the public hearing on February 28, 1964, and present reasons, if any they had, why R-5-A zoning, rather than R-3 zoning, was more appropriate for square 4119.

The National Capital Housing Authority is now in the process of condemning square 4119 as a site for low-rent public housing. The R-3 zoning assigned to square 4119, accordingly, bears on appellants' rights only to the extent, if any, that it may conceivably affect the compensation appellants may receive for their property. In this connection, it should be noted that appellants did not allege, or even suggest, in the court below, that the compensation they will receive for square 4119 under its present R-3 zoning will necessarily or even probably be less than they would receive had square 4119 been rezoned R-5-A.

While R-5-A zoning is, in some respects, less restrictive than R-3 zoning, it does not follow that land zoned R-5-A is, under all circumstances, worth more than land zoned R-3. In any event, it is clear that, under the circumstances here presented, square 4119 is not. As the record shows, the National Capital Housing Authority stated that, in developing square 4119 (and the other property owned by it on the other side of Montana Avenue) it

intends to utilize the provisions of Article 75 of the Zoning Regulations. Such provisions permit the owner of five or more acres of land, with Zoning Commission approval, to use such property for large-scale planned developments " * * * irrespective of use restrictions required by general zoning regulations. * * *"

Since Article 75 will permit substantially the same multi-family use of square 4119 under R-3 zoning as is permitted under R-5-A zoning, the compensation that will be paid to appellants upon condemnation of the property by the Housing Authority will likewise be substantially the same. It follows, of course, that the R-3 zoning accorded square 4119 has not subjected appellants to any irreparable injury such as would entitle them to the injunctive relief they seek.

CONCLUSION

Upon the foregoing, it is respectfully submitted that the judgment below should be affirmed as to the appellees who are the members of the Zoning Commission of the District of Columbia.

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MOTION TO DISMISS APPEAL AND BRIEF OF
THE UNITED STATES OF AMERICA AND
THE NATIONAL CAPITAL HOUSING AUTHORITY AS APPELLEES

UNITED STATES COURT OF APPEALS
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Appellees

APPEAL FROM THE UNITED STATES DISTRICT COURT
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United States Attorney,
Washington, D. C., 20001.

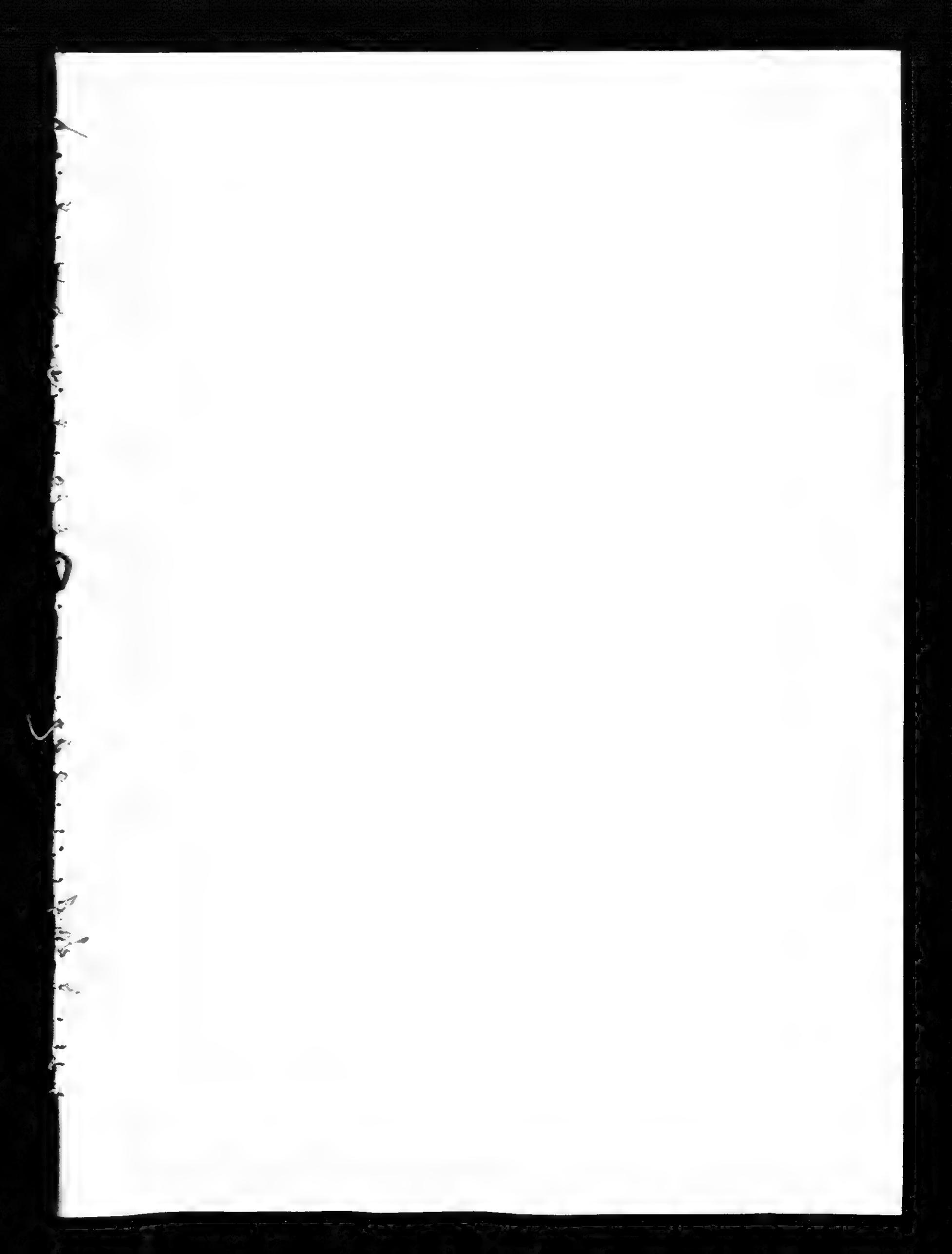
SYLVIA A. BACON,
Assistant United States Attorney,
Washington, D. C., 20001.

ROGER P. MARQUIS,
Attorney, Department of Justice,
Washington, D. C., 20530.

United States Court of Appeals
for the District of Columbia Circuit

FILED MAR 31 1965

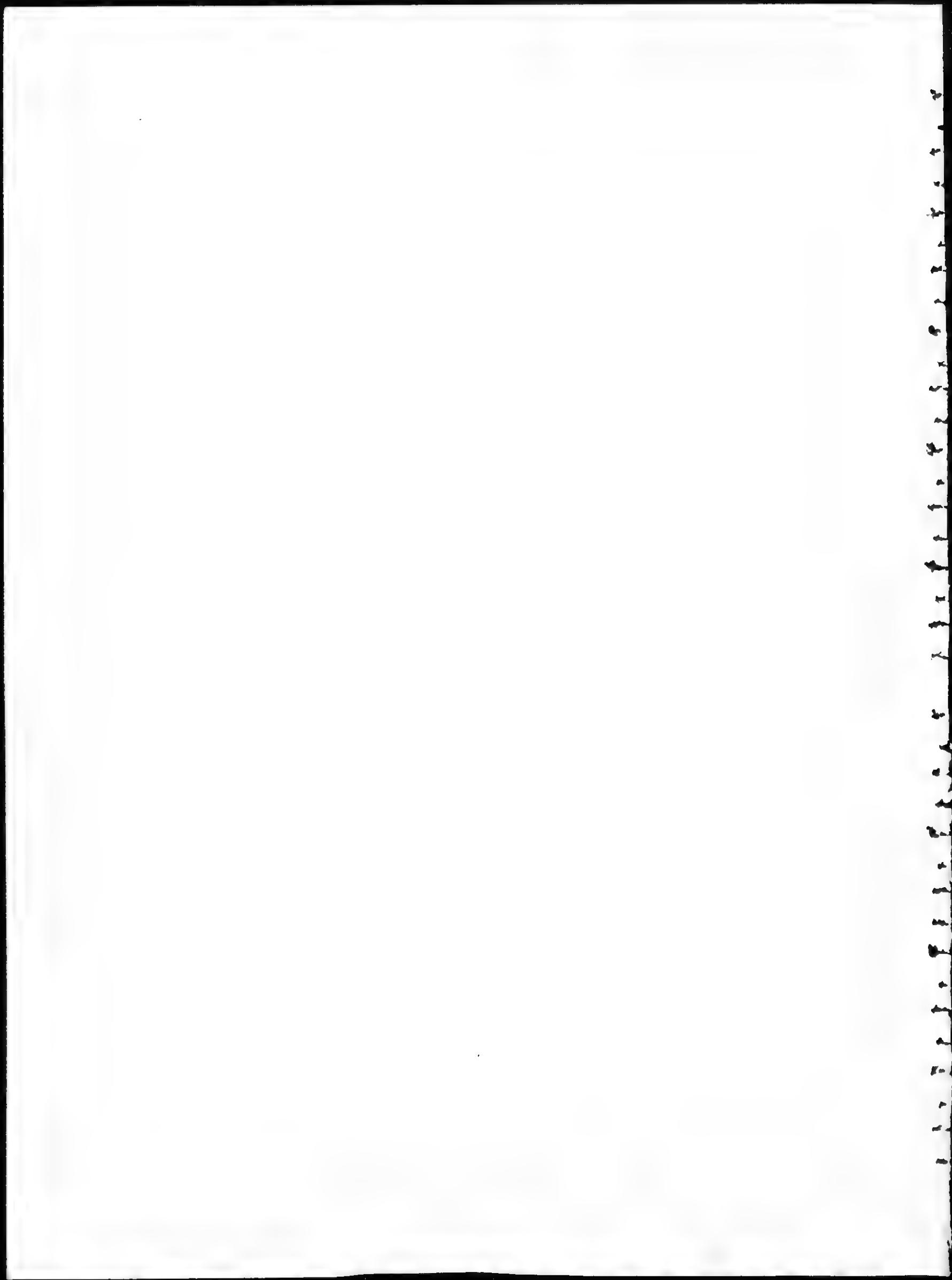
Nathan J. Paulson
CLERK



QUESTIONS PRESENTED

The National Capital Housing Authority secured a change of zoning in anticipation of condemning certain properties. The owners sought by injunction to reverse the zoning decision and to enjoin the condemnation proceedings. After judgments of dismissal, the condemnation proceedings were filed. The questions presented are:

1. Whether filing of the condemnation proceedings rendered this case moot and
2. Whether there is merit in appellants' attack upon the rezoning.



I N D E X

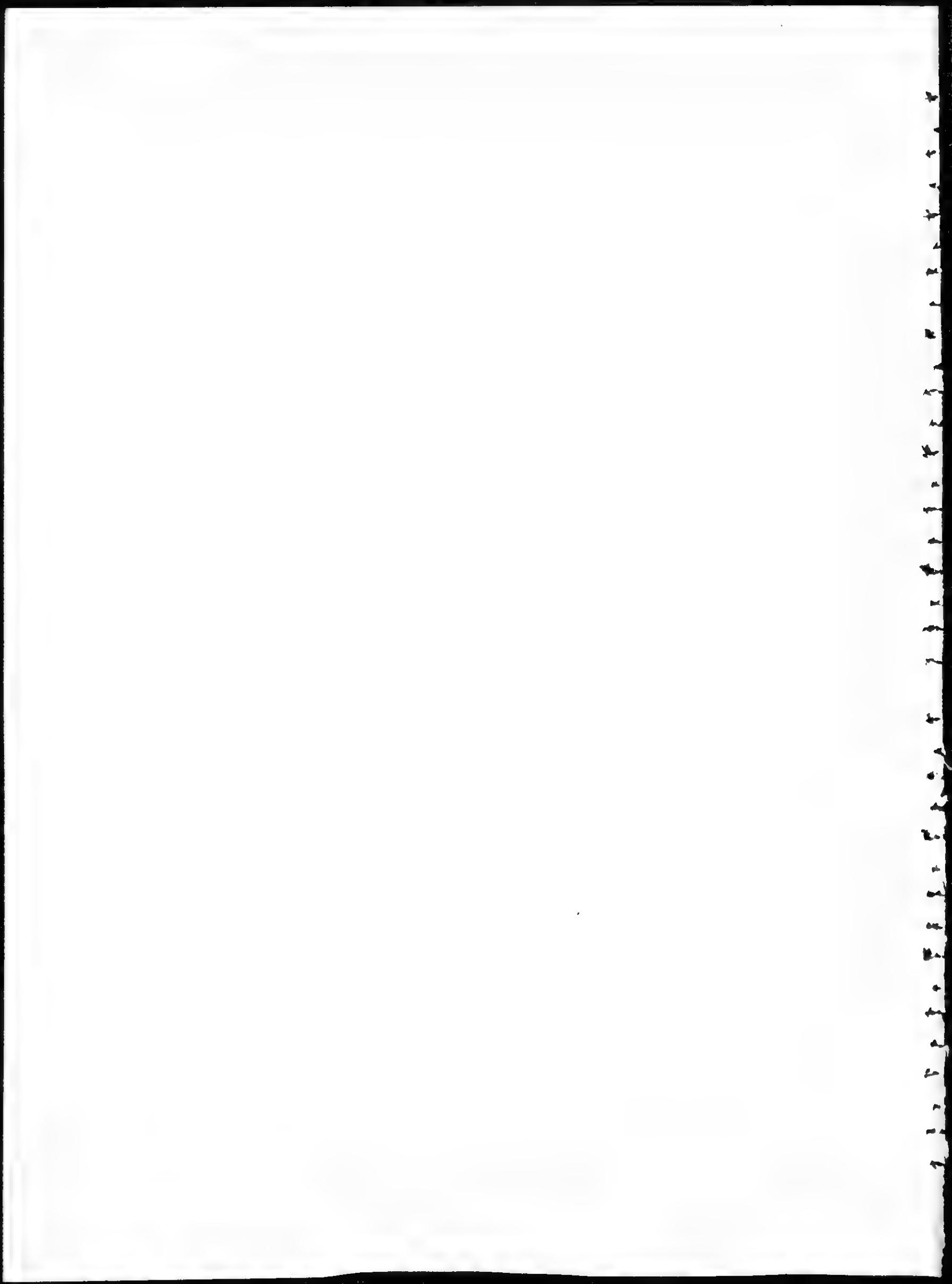
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* The case chiefly relied upon is marked by an asterisk.



UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,799

THE NATIONAL BANK OF WASHINGTON, ET AL.,

Appellants

v.

THE ZONING COMMISSION OF THE DISTRICT OF COLUMBIA,
THE UNITED STATES OF AMERICA and
THE NATIONAL CAPITAL HOUSING AUTHORITY,

Appellees

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MOTION TO DISMISS APPEAL AND BRIEF OF
THE UNITED STATES OF AMERICA AND
THE NATIONAL CAPITAL HOUSING AUTHORITY AS APPELLEES

MOTION TO DISMISS

The National Capital Housing Authority and its members, appellees herein, move to dismiss the appeal as to those appellees on the ground that the case is moot. The detailed basis for the motion is set out in the brief of appellees which follows.

BRIEF OF THE UNITED STATES OF AMERICA AND
THE NATIONAL CAPITAL HOUSING AUTHORITY AS APPELLEES

JURISDICTION

The jurisdiction of the district court was invoked under D.C. Code, Title 11, sec. 306. Judgment of dismissal was entered on June 15, 1964 (JA 35). Notice of appeal was filed on June 22, 1964. ~~JA 35~~ Jurisdiction of this Court is invoked under 28 U.S.C. sec. 1291.

STATEMENT

This is an injunction suit seeking, in effect, to reverse a zoning decision. Also, in the district court an injunction was sought against acquisition of certain properties by the National Capital Housing Authority (herein the "Authority"). The case on appeal has been greatly narrowed, especially as concerns the Authority, which is the sole concern of this brief.

In short, the facts are that the Authority, which was originally named the Alley Dwelling Authority, determined to acquire an area including Square 4119 for its purposes. Its statutory authority permits land acquisition "Provided that the same shall be done and performed in accordance with the laws and municipal regulations of the District of Columbia applicable thereto." D.C. Code, Title 5, sec. 103(e). By

letter of December 3, 1963, the Authority asked the Zoning Commission to change the zoning of Square 4119 from R-1-B, single family detached, to R-3, single family row houses. On December 30, appellants, the then owners, applied for a change of zoning of Square 4119 to CM-1. The Authority's request was granted and that of the appellants was denied. Appellants filed this suit in February 1964 and an amended complaint in March (JA 6-21). The Zoning Commission and its members were named as defendants. They are represented by the Corporation Counsel's office and are beyond the scope of this brief.

Also named as defendants were the United States, the Authority, its Chairman and its Executive Director (JA 20). The complaint alleged that the Authority and its officers had exerted improper pressure upon the Commission and sought an injunction against the taking of any action toward acquisition of the property, in addition to seeking an injunction setting aside the rezoning (JA 19-20). In the course of the trial court actions, which included attempted discovery proceedings, appellants attacked the right of the Authority to condemn the property. Upon motion to dismiss or for summary judgment, the court, on June 15, 1964, granted summary judgment as to the

United States, the Authority and its officers, and denied the preliminary injunction (JA 35'). By separate judgment at the same time, similar action was taken as to the Zoning Commission (JA 34'). Earlier, on May 18, 1964, the court had quashed the notice to take deposition, etc., of officers of the Authority. Notice of appeal was filed on June 22, 1964 (JA 33-44).

On June 30, 1964, a condemnation complaint, together with a declaration of taking, was filed to acquire, among other properties, Square 4119. Copies of these documents are set out in the Appendix hereto, infra.

SUMMARY OF ARGUMENT

I

Since proceedings to condemn the property have been filed in which any objections to the right to take and any issues concerning the effect of zoning on just compensation can be determined, this injunction suit is moot and the appeal should be dismissed.

II

Appellants do not repeat here the attack they made in the trial court upon the proposed condemnation. Their only remaining argument is that the Zoning Commission could not properly accede to the request of the Authority for rezoning to conform to its needs. This was plainly appropriate, if not compulsory; hence, appellants have no case on the merits.

ARGUMENT

I

THE CASE IS MOOT AND THE APPEAL
SHOULD BE DISMISSED

Condemnation proceedings have been instituted and are now pending. Appellants may there assert (and, in fact, have done so unsuccessfully) any defense they have to the taking. Thus, the court could not, in any event, grant the prayer sought in this case to enjoin such a taking. Cf. Donnelly v. District of Columbia Redevel. Land Agency, 106 U.S.App.D.C. 99, 269 F.2d 546 (1959), cert. den., 361 U.S. 949. And since the Authority has held title since June 30, 1964, the court could not now reverse the Zoning Commission's denial of appellants' application for rezoning and, thus, compel the rezoning appellants sought.

We anticipate appellants will argue that the courts should declare the rezoning to have been invalid because of its collateral effect on the compensation awarded for the taking. But that does not alter the fact that no effective relief can be granted in this case and, hence, appellants are now asking for resolution of an academic controversy. Moreover, like the

right to take, the issue of just compensation and, in that connection, the effect of zoning are properly the subject of decision in the condemnation case, not in this collateral proceeding. The zoning at the date of taking is not conclusive under all the circumstances. United States v. Meadow Brook Club, 259 F.2d 41 (C.A. 2, 1958), cert. den., 358 U.S. 921. Appellants have their remedy to urge any argument they have as to compensation and the effect of zoning thereon. The appeal should, therefore, be dismissed as moot.

II

APPELLANTS FAIL TO SHOW BASIS
FOR REVERSAL

Appellants have not sought review of rejection of the requested injunction against condemnation proceedings. They have not argued the claimed invalidity of the taking as they did in the trial court. Hence, we will not answer those arguments nor will we discuss the sovereign immunity problem which that requested relief raises, since the Authority is a federal agency. Keyes v. United States, 73 App.D.C. 273, 119 F.2d 444 (1941), cert. den., 314 U.S. 636.

It is, we submit, clear that appellants have no cause for complaint. The so-called "pressure" exerted by the Authority consisted simply of conforming to the requirements of the Act that it secure appropriate zoning for its projects. We need not discuss here the question whether the Zoning Commission could veto the Authority's determination to acquire certain property by denying rezoning. ^{1/} Certainly it is perfectly appropriate for the Commission to give effect to the Authority's determination. That is all this case comes to.

CONCLUSION

The appeal should be dismissed as moot or the judgment below affirmed.

Respectfully submitted,

RAMSEY CLARK,
Assistant Attorney General.

DAVID C. ACHESON,
United States Attorney,
Washington, D. C., 20001.

SYLVIA A. BACON,
Assistant United States Attorney,
Washington, D. C., 20001.

ROGER P. MARQUIS,
Attorney, Department of Justice,
Washington, D. C., 20530.

NOVEMBER 1964

1/ The statute authorizes the Authority to acquire lands to replat areas and construct dwellings as deemed advisable.

APPENDIX

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA
DISTRICT COURT DOCKET NO. 13-64

UNITED STATES OF AMERICA,)
PLAINTIFF,)
v.) COMPLAINT
2 PARCELS OF LAND IN SQUARES) Filed June 30, 1964
4119 and 4121 and PARCEL 154/95)
IN THE DISTRICT OF COLUMBIA,)
THE NATIONAL LUTHERAN HOME)
FOR THE AGED, ET AL., AND)
UNKNOWN OWNERS,)
DEFENDANTS.)

1. This is an action of a civil nature brought by the United States of America at the request of the National Capital Housing Authority for the taking of property under power of eminent domain and for the ascertainment and award of just compensation to the owners and parties in interest.

2. The authority for the taking is the Act of March 1, 1929, as amended, c. 416, 45 Stat. 1415 et seq. (D.C. Code Title 16, Sec. 619 to 644, now Title 16, Secs. 1351 to 1368, inc., D.C. Code, 1961, Supp. III), being the Act of December 23, 1963, 77 Stat. 577-581, P.L. 88-241; the Act of

June 12, 1934, c. 465, 48 Stat. 930, as amended by the Act of June 25, 1938, c. 691, 52 Stat. 1186 (D.C. Code Title 5, Sec. 103 to 116); and the U.S. Housing Act of 1937, approved September 1, 1937, as amended, c. 896, 50 Stat. 888 (U.S. Code Title 42, Sec. 1401 et seq.), and the Housing Act of 1949, P. L. 171, 81st Congress, approved July 15, 1949, 63 Stat. 413 et seq., and all other acts amendatory of or supplementary to the said Acts.

3. The public use for which the property is to be taken is the provision of decent, safe and sanitary dwellings for families of low income in the District of Columbia, pursuant to the Act of June 12, 1934, as amended (Supra), and the U.S. Housing Act of 1937, as amended (Supra).

4. The interest in the property to be acquired is an estate in fee simple absolute.

5. The property in and to which the foregoing interest and estate is to be taken is described in Exhibit "A" hereto attached.

6. The persons, firms or corporations having or claiming an interest in the property whose names are ascertainable by a reasonably diligent search of the land records and whose names have otherwise been learned are set forth in Exhibit "C" hereto attached.

7. The Board of Commissioners of the District of Columbia may have or claim an interest in the subject property by reason of taxes and assessments due and exigible.

8. All persons, firms and corporations named as defendants herein are joined as defendants generally to the end that all right, title, interest and estate of all said defendants in and to any and all of the parcels herein involved shall be divested out of them and vested in the plaintiff.

9. In addition to the persons named, there are or may be others who have or may claim some interest in the property to be taken, whose names are unknown to plaintiff, and such persons are made parties to the action under the designation "Unknown Owners".

WHEREFORE, the plaintiff demands judgment that the property be condemned and that just compensation for the taking be ascertained and awarded and for such other relief as may be lawful and proper.

UNITED STATES OF AMERICA

DAVID C. ACHESON
United States Attorney

/s/ ANTHONY C. LIOTTA
ANTHONY C. LIOTTA

/s/ D. H. BLACKWELDER
D. H. BLACKWELDER

Attorneys, Department of Justice
Room 6810, U. S. Court House
Washington, D. C.

Trial by jury of the issue of just compensation is demanded by plaintiff.

DAVID C. ACHESON
United States Attorney

/s/ ANTHONY C. LIOTTA
ANTHONY C. LIOTTA

/s/ D. H. BLACKWELDER
D. H. BLACKWELDER

Attorneys, Department of Justice
Room 6810, U. S. Court House
Washington, D. C.

EXHIBIT "A"

The lands to be acquired herein are described as all of those lots or parcels of land in the District of Columbia, together with all buildings and improvements thereon and all appurtenances thereto and all interests therein, as now more particularly shown and designated among the Records of the Office of the Assessor and Surveyor of the District of Columbia on a Plat of Survey dated July 8, 1963, designated as Map No. 8764, recorded in the Office of the Surveyor of the District of Columbia in Survey Book No. 177, Page 146, described as follows:

Parcel 1

Lot 823

Square 4121

Parcel 3

Lot 154/55

Parcel 4

Lots 1 to 5,
inclusive and
Lots 800, 801
and 802

Square 4114

EXHIBIT "C"

The persons, firms and corporations having an interest in the property to be acquired herein, whose names are ascertainable by a reasonably diligent search of the land records and whose names have otherwise been learned, are as follows:

Parcel 1

The National Lutheran Home
for the Aged, A D.C.
corporation

c/o Wilkes & Artis
Attorneys at Law
Attention:
J. Hampton Baumgartner, Jr.
Atty. at Law
500 Tower Building
Washington, D. C.

Samuel Queen, unknown heirs,
alienees and devisees of

John A. Wilson, unknown heirs,
alienees and devisees of

Richard Queen, unknown heirs,
alienees and devisees of

Joseph Queen, unknown heirs,
alienees and devisees of

District of Columbia

c/o Commissioners of the
District of Columbia
District Building
14th and E Streets, N. W.
Washington, D. C.

Parcel 3

Carleton U. Edwards, II,
Trustee under Will and
Testament of Carleton U.
Edwards

Union Trust Company of the
D.C., Substitute Trustee

Rachel L. Edwards

The Second National Bank
of Washington, now the
First National Bank of
Washington

Joseph A. Beirne, Trustee

Carlton W. Werkau, Trustee

Washington Gas Light
Company

District of Columbia

4312 Rosedale Avenue
Bethesda, Maryland

15th and H Streets, N.W.
Washington, D. C.

3346 Stapleton Pl., N.W.
Washington, D. C.

c/o Trust Department
1701 Penna. Ave., N. W.
Washington, D. C.

3103 Cummings Lane
Chevy Chase, Maryland

c/o Trust Department
First National Bank of
Washington
1701 Penna. Ave., N.W.
Washington, D. C.

1100 H Street, N.W.
Washington, D. C.

c/o Commissioners of the
District of Columbia
District Building
14th and E Streets, N.W.
Washington, D. C.

Parcel 4

Robert S. Nash, Trustee
under a Joint Venture
Agreement and Trust dated
12/27/60

Donald S. Nash, Trustee
under a Joint Venture
Agreement and Trust
dated 12/27/60

The National Bank of
Washington, Trustee under
a Joint Venture Agreement
dated 12/27/60

District of Columbia

50 Florida Avenue, N.E.
Washington, D. C.

50 Florida Avenue, N.E.
Washington, D. C.

14th and G Streets, N.W.
Washington, D. C.

c/o Commissioners of the
District of Columbia
District Building
14th and E Streets, N.W.
Washington, D. C.

DECLARATION OF TAKING

Filed June 30, 1964

I, Walter E. Washington, Executive Director of the National Capital Housing Authority, do hereby declare that:

1. (a) The lands described in Schedule A attached hereto and hereby taken for the use of the United States under the authority of the Act of March 1, 1929, as amended, c. 416, 45 Stat. 1415 et. seq. (D. C. Code Title 16, Sec. 619 to 644); the Act of June 12, 1934, c. 465, 48 Stat. 930 as amended by the Act of June 25, 1938, c. 651, 52 Stat. 1186 (D. C. Code Title 5, Sec. 103 to 116); and the U. S. Housing Act of 1937, approved September 1, 1937, as amended, c. 856, 50 Stat. 888 (U. S. Code Title 42, Sec. 1401 et seq.), and the Housing Act of 1949, P. L. 171, 81st Congress, approved July 15, 1949, 63 Stat. 413 et seq.

(b) The public use for which such lands are taken is the provision of decent, safe and sanitary dwellings for families of low income in the District of Columbia, pursuant to said Act of June 12, 1934, as amended (Supra), and the U. S. Housing Act of 1937, as amended (Supra).

2. A description of said lands sufficient for the identification thereof is set forth in Schedule A, annexed hereto and made a part hereof.

3. The estate hereby taken for said public use as aforesaid is an estate in fee simple absolute in and to said lands.

4. Plat showing the said lands annexed as Schedule B and made a part hereof.

5. The sum of money estimated by the National Capital Housing Authority to be just compensation for said lands, including all buildings and improvements thereon, all the appurtenances thereto and all the interests therein, is set forth in Schedule A, annexed hereto and made a part hereof. Said sum is herewith deposited by the Authority in the Registry of this Court to the use of the persons entitled thereto.
IN WITNESS WHEREOF, I, Walter E. Washington, Executive Director of the National Capital Housing Authority, thereunto duly authorized, sign this Declaration of Taking this 22nd day of June, 1964, in the City of Washington, District of Columbia.

/s/ Walter E. Washington
WALTER E. WASHINGTON, Executive Director
National Capital Housing Authority

SCHEDULE "A"

ANNEXED TO AND FORMING PART OF THE FOREGOING
DECLARATION OF TAKING

The lands to be acquired herein are described as all of those lots or parcels of land in the District of Columbia, as now more particularly shown and designated among the Records of the Office of the Assessor and Surveyor of the District of Columbia, and as more particularly shown on a Plat of Survey dated July 3, 1963, designated as Map No. 8764, recorded in the Office of the Surveyor of the District of Columbia in Survey Book No. 177, Page 146, described as follows:

<u>Parcel No. 1</u>		<u>Estimated Value</u>
Lot 823	Square 4121	\$115,000.00
<u>Parcel No. 3</u>		
	Parcel 154/95	\$2,500.00
<u>Parcel No. 4</u>		
Lots 1 to 9 inclusive and Lots 800, 801 and 802	Square 4119	60,000.00

The total sum of money estimated by the National Capital Housing Authority to be just compensation for the aforesaid lands in this proceeding and hereby taken is Two Hundred Sixty Seven Thousand Five Hundred Dollars (\$267,500.00).

